SUPREME COURT, U. S.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 62

THOMAS R. KAISER,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

BRIEF FOR PETITIONER

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Opinions Below

The majority opinion of the Court of Appeals of the State of New York is dated December 7, 1967, and is reported at 21 N.Y. 2d 86, 286 N.Y.S. 2d 801, 233 N.E. 2d 818 (A. 305-321).* The dissenting opinion of Chief Judge Stanley Fuld (A. 321-328) is reported at 21 N.Y. 2d 86, 104, 286 N.Y.S. 2d 801, 816, 233 N.E. 2d 818.

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* "A" Refers to the Petitioner's Appendix filed in this Court.

The Appellate Division, Second Department, of the Supreme Court of the State of New York affirmed the Petitioner's convictions without opinion. The "Memorandum" Report of the Affirmance is reported at 28 A.D. 2d 647, 282 N.Y.S. 2d 207. (A. 298.)

Prior to trial the Petitioner moved in the County Court of Nassau County, New York, for an order "declaring unreasonable, illegal and void the interception of telephone communications" in his case and for an order "precluding the District Attorney from using as evidence upon the trial of the Indictment herein, the fruits of such intercepted telephonic communications obtained during the course of, or as a result of, the said unreasonable, illegal and void interception." Both motions were denied in an opinion which is reported at 48 Misc. 2d 868, 265 N.Y.S. 2d 1018. (A. 56-61.)

Jurisdiction

The order (remittitur) of the Court of Appeals of the State of New York was dated December 7, 1967. (A. 303.) The Petition for a Writ of Certiorari was granted on April 22, 1968. (A. 331.)

The jurisdiction of this Court rests on 28 U.S.C. 1257 (3) since: 1. There is necessarily drawn into question the validity of a State statute (N.Y. Code Crim. Proc. § 813-a) on the ground of its being repugnant to the Constitution and the Laws of the United States, and 2. The Petitioner is claiming rights, privileges and immunities under the Constitution and the Laws of the United States.

Questions Presented

Petitioner was convicted of participating in a conspiratorial attempt to commit the crime of extortion. State prosecutive authorities have stipulated that the indictment and conviction of the Petitioner were completely dependent upon evidence secured by the electronic interception (wiretapping) of a telephone conversation to which the Petitioner was a party. The interceptions and the use of the evidence obtained thereby were without the authorization of either party to the said telephone conversations.

The questions are:

1. Is the secret electronic interception of a telephone conversation (wiretapping) unconstitutional under the Federal Constitution—Supremacy Clause, Fourth, Fifth, Ninth and Fourteenth Amendments—by virtue of the prohibitions contained in the Federal Communications Act (47 U.S.C. 605)?

2. Where a State judicial order authorizes, for sixty days, the secret electronic interception (wiretapping) of all incoming and outgoing telephone conversations on a particular telephone, are such interceptions unconstitutional under the search and seizure standards of the Fourth Amendment, the retained rights provision of the Ninth Amendment, and the due process clause of the Fourteenth Amendment?

3. Where the secret electronic interception of telephone conversations (wiretapping) is conducted pursuant to a State judicial order and the order does not provide for, nor is there in fact, a return made upon the warrant to

the authorizing magistrate, do such interceptions violate the search and seizure standards of the Federal Fourth and Fourteenth Amendments?

4. Where a State statute (N.Y. Code of Criminal Procedure § 813-a) which authorizes the judicial issuance of orders for the secret electronic interception (wiretapping) of telephone conversations is unconstitutional on its face under the Federal Fourth and Fourteenth Amendments, are all judicial orders issued thereunder and all interceptions made pursuant to such orders likewise unconstitutional?

5. Since the Petitioner was convicted solely upon evidence adduced by the use of recorded secret interceptions of telephone conversations to which he was a party, must his conviction be vacated if such interceptions were made in violation of the United States Constitution—Supremacy Clause, Fourth, Fifth, Ninth and Fourteenth Amendments?

6. Where the prosecutor, in the presence of the jury, intentionally and repeatedly refers to recorded wiretapped conversations of the Defendant as being "confessions," when, in fact, they are merely circumstantial evidence, is the Defendant so prejudiced thereby as to deny him a fair trial in violation of the Federal Fourteenth Amendment?

Constitutional Provisions and Statutes Involved

The Federal Constitutional provisions involved are Article Six (Supremacy of the Constitution and Laws of the United States), the Fourth Amendment (privacy, search and seizure), the Fifth Amendment (privacy and

self incrimination), the Ninth Amendment (reserved right of privacy) and the Fourteenth Amendment (abridgement of privileges and immunities and deprivation of liberty without due process of law).

The Federal statute involved is the Federal Communications Act of 1934, 48 Stat. 1064, 1103, 47 U.S.C. 605 (prohibition against the interception of any telephone communication).

The New York State Constitutional provision involved is Article One, Section Twelve (searches and seizures, and interception of telephone communications).

The New York State statute involved is the New York Code of Criminal Procedure § 813-a (authorization for *ex parte*, judicial orders for wiretapping).

The aforesaid Constitutional and statutory provisions are quoted in Appendix A hereto, *infra*.

The State statutes upon which the Petitioner was convicted are New York Penal Law: § 580-a (conspiracy), § 850 and § 851 (attempted extortion) and § 530 (coercion). These statutory provisions are not printed herein because no issue relating thereto is raised by the Petitioner.

Statement of the Case

On July 16, 1964, the Petitioner was indicted in the County Court of Nassau County, New York, together with two other named defendants—Salvatore Granello (also known as Sally Burns) and Dino Conte (also known as Dino Harris). In addition, there were four unnamed defendants who were unknown to the Grand Jury and were thus identified fictitiously in the indictment.

The indictment (A. 1-8)* was in six counts** and, in essence, charged a conspiratorial attempt to extort $25,000.00 and twenty five per cent of the profits of his coin machine business from one Irving Holtzman. The conspiracy was alleged to have existed during the period from May 1, 1964 to July 15, 1964 (A. 2).

The Petitioner entered a plea of not guilty to the indictment; his case was severed from that of the other defendants; he was tried alone and was found guilty upon three of the six counts charged: Conspiracy (to extort); Attempted Extortion and Coercion. (A. 265.)

The theory of the prosecution's case against the Petitioner was that two of the co-conspirators, Granello and Conte, devised and put into effect a plan to perpetrate the extortion upon Holtzman.

The Petitioner had had a business relationship with Holtzman and thus had access to some information concerning Holtzman's financial position. It was alleged that

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* "A" preceding a page number is used in this brief to denote a reference to the Petitioner's Appendix in this Court. "R" preceding a page number is used in this brief to denote a reference to the typewritten transcript of the trial.

** The crimes charged in the indictment are as follows:— First Count: Conspiracy (A. 1); Second Count: Attempted Extortion (A. 4); Third Count: Coercion (A. 3); Fourth Count: Assault in the Second Degree (with a dangerous weapon) (A. 6); Fifth Count: Assault in the Second Degree (with intent to commit a felony) (A. 6); Sixth Count: Burglary in the Second Degree (A. 7). Counts four, five and six relate to an incident where four unknown men went to the Holtzman house and one of them pushed his way into the house, assaulted Mrs. Holtzman and brandished a gun. No further connection was shown between these acts and the conspiracy other than the fact that the incident occurred during the alleged time period of the conspiracy. The Petitioner was acquitted of these three counts. (A. 265.)

the Petitioner had conveyed this information to Granello and Conte with full awareness of the purpose for which it would be used, i.e., to facilitate the extortion attempt. (A. 238.) The only evidence of the Petitioner's alleged involvement in the conspiracy was in the form of two wiretap recordings of telephone conversations between the Petitioner and Conte. The origin and use of these recordings are discussed fully in this statement of facts.

Stipulation by the Attorneys for the Petitioner and the Respondent in Aid of This Court

The attorneys for the Petitioner and the Attorneys for the Respondent have, in aid of this Court, entered into the following stipulation concerning the wiretaps of the Petitioner's conversations:

"In aid of the Court, the attorneys for the Petitioner and the attorney for Respondent enter into the following stipulation concerning the factual background of the Petitioner's conviction:

"The indictment and conviction of the Petitioner were completely dependent upon evidence secured by the State of New York by means of the electronic interception of telephone conversations to which the Petitioner was a party. The interceptions in question and the use of the evidence obtained thereby were without the authorization of either party to the said telephone conversations. The interceptions were made pursuant to an *ex parte* order issued by a County Court Judge of the State of New York under the authority of § 813-a of the New York State Code of Criminal Procedure. Independent of the evidence so obtained, the People of

the State of New York were possessed of nothing which implicated or tended to implicate the defendant in the crimes charged."

The original signed stipulation is on file with the clerk of this Court. This dependence was also conceded by the prosecution at the trial (A. 62-63) and upon the appeals in the courts below.

The Application for the Wiretap Orders

During the course of the investigation in the present case, various types of electronic surveillance were used by the police and the district attorney. With his permission, Holtzman's home telephones were tapped (R. 290), his office was "bugged" (R. 290), and two telephone calls which he made to Granello from a pharmacy were tapped (R. 290).

Aside from the above, there were at least four telephones which were tapped: one telephone at the Headliner Bar, discussed below; two telephones at Patrissy's Restaurant, discussed below; and a telephone listed to one Audrey Graziano. The Graziano tap and the unsuccessful efforts of Petitioner's trial counsel to learn about any additional taps, are discussed *infra* at page 19.

By written petitions, dated June 30, 1964, an assistant district attorney of Nassau County, Norman Levy, applied to a judge of the County Court for orders, pursuant to section 813-a of the New York Code of Criminal Procedure, to tap three telephones.

The first petition (A. 17) was for permission to tap the telephone located at the Headline Bar in the Times Square

area of Manhattan. This tap later produced two telephone conversations which were used in evidence at the trial of the Petitioner and which were the only evidence alleged to connect the Petitioner with the crimes charged.

The second petition* was for permission to tap two public telephones which were located at Patrissy's Restaurant in lower Manhattan.

Both of the above petitions were forms, with the blanks appropriately filled in, and alleged that Mr. Levy was then engaged in the investigation of crimes committed in violation of the Penal Law of the State of New York, particularly Attempted Extortion, Conspiracy to Commit the Crime of Extortion and Conspiracy to Commit a Crime. The petitions stated that, in connection with the above investigation, Mr. Levy was conducting an investigation of the criminal activities of Salvatore Granello, Dino Conte and other unknown persons,

> "who, your petitioner is informed and believes, have been and are engaged in criminal activities in connection with the aforesaid crime, and who, either as participants or as material witnesses, have knowledge or information regarding said crime and are in communication by telephone with other persons having such knowledge and information." (A. 17-18.)

The petitions then go on to allege that the telephone in question (in the one case at the Headline Bar and in the other case at Patrissy's Restaurant) is believed to be "the means of carrying on and promoting criminal activities"

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* This second petition is not reproduced in our Appendix due to the inability of the County Clerk of Nassau County to locate it. If it is located, it will be submitted to the Court separately.

by the persons in question, and it is believed "that evidence of crime may be obtained by intercepting telephone communications being transmitted over the aforesaid telephone instrument. . . ." (A. 18.) The petitions requested permission "to intercept and record all telephone communications made by and to the said Salvatore Granello, Dino Conte and any and all other persons communicating by both incoming and outgoing calls over said telephone(s) . . . from the date of making such order, up, to and including the 29th day of August, 1964." (A. 18.)

Upon being presented with the above petitions, Judge Spitzer of the County Court, held an *ex parte* hearing in chambers. Aside from Mr. Levy, the only other person present was a confidential stenographer who made a stenographic record of the proceeding. (A. 83.) The hearing minutes are reproduced at A. 20-40.

Mr. Levy was sworn and commenced to relate the information upon which he sought the orders. The chronology of events, as related by Mr. Levy, was as follows:

On June 4, 1964, Dino Conte visited Holtzman's office and indicated that he had been sent by Granello and that Granello was upset that Holtzman had been using Granello's name for the purpose of securing coin machine locations. Holtzman denied having personally used Granello's name, but admitted that one of his employees had done so without authorization. Granello called Holtzman later that day, and they arranged to have lunch at Holtzman's office on the following day. Granello failed to appear for the luncheon appointment. (A. 21-24.)

On June 8, 1964, Holtzman left his home in Roslyn, New York for his Manhattan office at 7:40 A.M. Approximately

five minutes later, a man, claiming to be from the United Parcel Service, rang the doorbell of Holtzman's home, and his wife, Ruth Holtzman, answered the door. When she opened the door, the man shoved her backward and she fell to the floor. The man put his hand over her mouth and asked her "Where is your husband?" She then screamed and struggled with the man, grabbing his eyeglasses. The man pulled a gun, and three other men, who had been waiting outside, informed him that the neighbors would call the police and that they had better leave. The four men then left in an automobile.* (A. 24-25.)

When Holtzman arrived at his office that day, he was notified of the above incident and returned home. At home, Holtzman received a message to call Granello at a certain number. (The number in question was the number which was later tapped at the Headline Bar.) Holtzman called the above number and asked for Granello who came on and told Holtzman to go to an outside telephone and call him again. Holtzman did so and asked Granello if he knew what had happened to Mrs. Holtzman. Granello replied that he knew all about it and would like to meet Holtzman at the Charles Restaurant in Manhattan so that they could talk about what had happened to Mrs. Holtzman. (A. 25-26.)

Holtzman went to the Charles Restaurant and spoke with Granello. During the conversation, Granello told Holtzman

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* As noted above at page 6, this attack upon Mrs. Holtzman formed the basis for three counts of the indictment. The assailants were never identified. At the trial, Mrs. Holtzman testified that she did not recognize any of the men, and that the Petitioner, Granello and Conte were *not* among the assailants. (A. 220.) The Petitioner was acquitted by the jury on the charges which grew out of this attack.

that he had heard about the attack, and that it would not have occurred had they met during the prior week. Granello is alleged to have then made the following statements:

• • • • •

"The people I'm with are animals. They couldn't wait till I came home."

• • • • •

"Even Costello had to give up a piece."

• • • • •

"Now with you the family wants $25,000.00 in cash and I want you to give it to them."

• • • • •

"I would never mention the word 'family' but with you I have no worries and I want 25 per cent of what you have—not what your partners have—just you."

• • • • •

"If at the end of the week you have $1.00 left I take 25 cents and you keep 75 cents."

Holtzman told Granello that he would have to think about it. They arranged to meet at the same restaurant on the following day, June 9, 1964. (A. 26-27.)

That evening, Holtzman notified law enforcement authorities of the meeting he had had with Granello. He also told them that as he was leaving the meeting, he saw Dino Conte at the bar of the Charles Restaurant. (A. 27-28.)

On June 9, 1964, in the presence of Assistant District Attorney Levy, Holtzman called the Charles Restaurant and asked Granello, if he, Holtzman, should go to another

telephone and call again. Granello said he should. Holtzman went to a pharmacy and again called Granello at the Charles Restaurant in the presence of Levy and various police officers. The telephone call was monitored and recorded by the police with the permission of the owner of the pharmacy and of Mr. Holtzman. In the conversation, Holtzman referred to the prior day's conversation and told Granello that he did not have any method of raising $25,000.00 for the family and he thought it should be reduced. Granello said that the figure could not be changed, but that he would try to work something out. He denied responsibility for the attack on Holtzman's wife, and blamed it on outsiders. It was then arranged for Holtzman to call Granello on the following day at 10:00 A.M. for the purpose of confirming a noon meeting at Charles Restaurant. Granello gave Holtzman his home telephone number to call. He also said that if Holtzman wanted to call him on that evening, he planned to be at home or at Patrissy's Restaurant (CA 6-8509) or at the LW number which had been called on an earlier date (The Headline Bar). (A. 28-33.)

On June 10, 1964, Holtzman called Granello at his home and told him he would call him again at the Charles Restaurant at 12 noon.* Holtzman did not make the noon call, and, later that afternoon, he received a telephone call from Dino Conte who said that Granello was waiting for Holtzman to call. Conte told Holtzman that Granello had left the Charles Restaurant, but could now be reached at the Headline Club. Holtzman called the Headline Club

* This telephone conversation and all those subsequently described were tapped and recorded but this is not revealed in Mr. Levy's testimony before Judge Spitzer. (*See* R. 471-490.)

(Headline Bar) and spoke to Granello. He explained that he had not called earlier due to the fact that the District Attorney had posted a man at his house. They agreed to meet for a discussion within a few days. (A. 33-35.)

On June 15, 1964, as the result of a telephone call from Holtzman, Granello met with Holtzman at Holtzman's office and gave Holtzman the telephone number of his summer home. (A. 35.)

On June 23, 1964, Granello again met with Holtzman at Holtzman's office. He asked Holtzman for $12,500.00 for the family and told him that "If you don't want to make a deal with them I'll bow out." Holtzman said he would let Granello know by Friday or Monday. (A. 35.)

Assistant District Attorney Levy later learned that on this same day, one Joseph Albino received a telephone call from Rocky Graziano, the prize fighter. Albino was at that time a business associate of Holtzman, and Graziano was Albino's cousin. Graziano told Albino "I understand your partner Irv (Holtzman) and you are having a little trouble. I can't talk to you on the phone. Can you read between the lines? Can I come up to see you?" (A. 36.)

On June 26, 1964, Dino Conte called Holtzman's office and left word that Holtzman had made an appointment and didn't keep it and "that is no way to act." (A. 35.)

On June 28, 1964, Graziano visited Albino and told him that he had been sitting at a table with certain persons and these persons were "talking rough. They said they were going to hurt your partner, Irv, and you." Graziano said he told these persons not to hurt Albino. He asked Albino what the problem was and Albino told him about Granello's demands. Graziano advised Albino not to take

sides, to stay neutral, not to worry and that he would not get hurt. Graziano further said "The guys want an answer. Tell him the guys are waiting for an answer." (A. 36-37.)

On June 29, 1964, "Holtzman called Granello and told him that he was not going to give any money to the family and was not going to give Granello any part of his business." Granello responded "Okay, buddy, I'm bowing out. Now you're on your own." (A. 35.)

On June 30, 1964, Dolores Billing, Holtzman's married and pregnant daughter received a telephone call from an unidentified person warning her that if her father didn't cooperate, she would be assaulted. The caller is not alleged to have given any indication concerning with whom her father was supposed to cooperate or what the subject matter of the cooperation was. (A. 35-36.)

On June 30, 1964, certain Nassau County police officers saw Granello use two public telephones in Patrissy's Restaurant. The telephone numbers were CA 6-8509 and CA 6-8854. (A. 37-38.)

These are two of the telephones for which a wiretap order was sought and obtained by Assistant District Attorney Levy. (A. 41, 43.)

This is also the date that appears on the wiretap petitions which were presented on the following day to Judge Spitzer of the County Court by Mr. Levy. (A. 19.)

On July 1, 1964, Judge Spitzer held the *ex parte* hearing which produced the above testimony of Mr. Levy. At the end of Mr. Levy's testimony, the following colloquy occurred:

"Mr. Levy: . . . The basis of the People's application, your Honor, is the affidavit by Norman J. Levy that is before you and the sworn testimony of Norman J. Levy which you have heard.

"The Court: Mr. Levy have you been trying to verify whether the daughter of Holtzman was in fact threatened?

"Mr. Levy: Your Honor, Detective John Skuzenski of the Nassau County Police Department assigned to the District Attorney's Squad interviewed Mrs. Dolores Billing at her home on Sylvia Lane yesterday and the facts that I have testified to before your Honor were stated to Detective Skuzenski by Mrs. Billing.

"The District Attorney's office and the Nassau County Police Department are working on an investigation to identify the caller.

"The Court: At the present time have you been able to get any clue which would lead you definitely to the caller?

"Mr. Levy: We have not, your Honor.

"The Court: You feel as though this tap will assist you in that quest?

"Mr. Levy: Yes, your Honor.

"The Court: From your experience over the years do you feel that there is reasonable ground to believe that evidence of crime may be obtained by intercepting messages over this telephone?

"Mr. Levy: Yes, your Honor. This telephone has been used by Salvatore Granello alias Sally Burns in telephone conversations with the complainant, Irving Holtzman, in regard to the demand for $25,000.00 and 25 per cent of his business.

"The Court: So that in addition to the alleged extortion you are faced here with the threats of violence and physical harm to innocent people?

"Mr. Levy: Yes, your Honor, and the investigation regarding the assault of Mrs. Ruth Holtzman at her home in Nassau County as well as the threatening telephone call to Mrs. Billing.

"The Court: I am satisfied that there is reasonable ground for granting your application." (A. 39-40.)

The Wiretap Orders

Upon the Assistant District Attorney's petition and testimony discussed above, Judge Spitzer issued two form orders with the blanks appropriately filled in for the different telephones in question. (A. 41-42, 43-44.)

Each of the orders recited that "there is reasonable ground to believe that evidence of crime may be obtained by intercepting telephone communications being transmitted over [the] telephone . . ." The orders provided that pursuant to Article I, Section 12 of the New York Constitution and Section 813-a of the New York Code of Criminal Procedure, the District Attorney, the assistant district attorney and any and all persons employed or assigned to their control or direction:

"hereby are authorized and empowered to intercept and record all telephone communications made by and to Salvatore Granello, Dino Conte and any and all other persons communicating by both incoming and outgoing calls . . ."

over the three telephones in question. The orders both provided for an effective period of sixty days, July 1, 1964 to August 29, 1964. (A. 42, 44.)

Installation of Wiretaps and Retrieval of the Wiretap Information

The following information concerning the installation and use of the known* wiretaps is taken from testimony given by Prosecution witnesses at the trial of the Petitioner.

John Donovan (A. 115-135), an internal auditor of the New York Telephone Company, testified that the subscriber of telephone number LW 4-2523 was the Headline Bar, a restaurant. The telephone had one extension, two portable phones and two jacks. (A. 116.) He said that the two telephone numbers at Patrissy's Restaurant were for coin machine telephones. (A. 120.)

Donovan explained the technical aspects of tapping a telephone wire (e.g., A. 117-119) and said that the terminal box for the telephone at the Headline Bar was located in the basement of a certain building. If one went to that box, identified the wires that the particular telephone was working on, and attached a tape recorder or a listening device to those wires, all conversation going into and out of the telephone would be recorded. Additionally, the device would pick up the dial tone and the ringing of the telephone before it was answered. (A. 120.)

Upon cross examination, Donovan testified that information concerning the proper wires to tap is provided to the

* As revealed below, at page 19, the Defense was not permitted to ascertain whether there were additional wiretaps used in the investigation of this case. It is respectfully urged that this Court direct the Respondent to reveal the nature and extent of any additional wiretapping and "bugging" which may have been taken place. A motion by the Petitioner requesting, among other things, that such an order issue, will be filed with this Court.

police department "under a subpoena and under no other condition." (A. 123.) (To the same effect, see A. 134.)

Donovan, on cross examination, revealed that he had testified in the grand jury in the present case about additional telephone taps other than those already mentioned. Defense counsel asked him if he recalled the additional taps. The question was objected to and a recess was called. (A. 126.) In the absence of the jury, defense counsel noted to the Court that the grand jury testimony of the witness revealed that a telephone line listed to one Audrey Graziano had also been tapped and that the defense wished to inquire as to additional wiretaps. (A. 128.) The request was denied by the Court with the following statement:

> " . . . we have a duty to protect people and I am not going to question the credibility to allow into this evidence of possible taps on other phones which may raise an inference by some publication in the newspaper that there might have been some implication of a person who is absolutely innocent, has nothing to do with this case, and by inference or some note in some paper, and I am not going to do that." (A. 128.)

William J. Beach (A. 136-143), a detective of the Nassau County Police Department, testified that he had been attached to the District Attorney's Rackets Bureau since 1958 and his "duties were primarily in the wiretapping field." (A. 136.) Prior to installing the tap in the present case, he had installed tapping devices "on many occasions, pursuant to a court order. . . ." (A. 139.)

On July 3, 1964, pursuant to a Court order and by means of information obtained from the New York Tele-

phone Company, he installed a recording device tapping the wires of the Headline Bar. The installation, securing and testing of the equipment involved took about thirty to forty-five minutes. (A. 141.) Beach described the operation of the equipment as follows:

> "The minute that the telephone is picked up from the cradle, the telephone receiver, the machine automatically starts and all during the time it will record every conversation, either incoming or outgoing, over that telephone, and when it's set down in the cradle the machine stops and it lays dormant until it's picked up." (A. 138.)

Clifford Crawford (A. 143-149), a detective of the Nassau County Police Department, testified that he was attached to the District Attorney's racket squad and had "been doing the wiretaps for the past five years for the Nassau County District Attorney's Office", and had much practical experience in the field. (A. 143.)

On July 3, 1965, Crawford installed a wiretap, connected to an automatic recording device, upon the line leading to telephone number CA 6-8854 at Patrissy's Restaurant. He did this pursuant to a court order. (A. 145.) He checked to determine whether he had tapped into the correct line by listening in and hearing someone answer the phone with the statement "Patrissy's Restaurant." (A. 145.)

On cross examination, when asked the approximate number of reels of tape which were used during the entire investigation of the case, to his knowledge, Crawford responded as follows:

"A. I would say over a hundred, maybe more, maybe two hundred; more. Honestly, I have never sat down and actually counted the tapes that were placed on it." (A. 148.)*

John Skuzenski (A. 149-156), a detective of the Nassau County Police Department, testified that he was attached to the District Attorney's Racket Squad, and on July 3, 1964, he accompanied Detective Beach (page 19, *supra*) when Beach installed the wiretap on the telephone of the Headline Bar. (A. 149.) Skuzenski placed a fresh reel of tape on the wiretap recorder, and he identified that reel of tape as being People's Exhibit 9. (A. 149-150.) He said that the tape recorder was then locked in a room, the lock being one which he had purchased at a hardware store. The two keys to the lock were given by him to a Detective Costello. (A. 154-155.)

On cross examination, he said that an unauthorized person could tamper with the machine and remove and replace the reel of tape on the machine by breaking into the locked room, during the period that the automatic machine was unattended. Such replacement could easily be done by a layman, and there was nothing particularly complicated about it. (A. 152-154.)

Thomas Costello (A. 156-167), a detective of the Nassau County Police Department, testified that he was attached to the District Attorney's Rackets Bureau, and on July 4, 1964 he went to the location of the Headline Bar wiretap

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* Crawford also installed, with Holtzman's consent, taps on Holtzman's home telephones, taps on a pharmacy telephone which Holtzman twice used to call Granello, and a bug in Holtzman's Manhattan's office. (R. 290.)

with two keys that he had received from Detective Skuzenski. He entered the room in which the recording device was secured, checked the device to see if it was working properly, and saw that the tape did not have to be changed. He secured the room and left. He returned to the room again on July 5, 1964, removed People's Exhibit 9 from the machine and replaced it with another reel of tape. The District Attorney's Office was closed on that day, and so, he brought People's Exhibit 9 home with him. (A. 156-158.) On July 6, 1964, he turned People's Exhibit 9 and the keys to the room over to a Sergeant Tozzi. (A. 158.)

About September 11, 1964, Costello obtained Exhibit 9, together with various other tapes (People's Exhibits 1, 2, 3, 4, 5, 6, 7, 8 and 10), from Sergeant Tozzi and gave them to Donald J. White, Confidential Reporter of the District Attorney's Office. On September 28, 1964, White returned these tapes to Costello, together with transcripts of the conversations that were on the tapes. Exhibits 1 through 10 were then returned to Sergeant Tozzi. (A. 159-161.)

On cross examination, the following exchange took place:

"Q. Now, will you tell us, Detective Costello, how many reels were removed from the tap on the Headliner Bar?

A. I have no idea.

Q. Could you hazard a guess?

A. It would be very hard to say.

Q. Would you say one hundred?

A. I doubt if it would be one hundred.

Q. Certainly over fifty?

A. No, it's probably less than fifty.

Q. Would you say it was more than thirty-five?

A. If I was to guess, I'd say maybe ten or fifteen.

Q. Ten or Fifteen from the Headline Bar?

A. And that would be strictly a guess.

Q. Would you know where those reels are now, Detective?

A. No, I have no idea where they are.

Q. Well, let me ask you detective: Would the reel be discarded if in the opinion of the detective who listened to it it contained nothing valuable?

A. No. When we work on a case, an investigation, all the reels are kept.

Q. No matter how innocuous they may appear?

A. That's correct.

Q. So that this ten or fifteen reels from the Headliner Bar are not in the custody of the District Attorney's Office?

A. They could very well be.

Q. Well, is there any doubt in your mind, detective?

A. No.

Q. That they are in the custody of the District Attorney, and could be produced if it was necessary?

A. Yes.

Q. Now, we have discussed Holtzman's home and we have discussed the phone booth and the Headliner Bar. Now, was there any other place where a tap with recording devices was set up?

A. I know there was one set up on Patrissy's Restaurant.

Q. Did you have something to do with the setting up of that tape?

A. No, I had nothing to do with setting up any taps.

Q. Could you do this, Detective: Could you estimate the number of reels that might have been taken from the taps set up at Patrissy's Restaurant?

A. I have no idea.

Q. Would you say again it might be something like ten or fifteen as of the Headline?

A. Could be; could be less, could be more. I have no records to indicate exactly how many taps were taken of any tap.

Q. And, again, of course, whether they were innocuous or not, they would now be in the custody of the District Attorney's office?

A. That is our policy, to hold on to those taps until such time as the case is disposed of.

Q. And there is no reason in this particular case to vary that policy?

A. No.

Q. Now, do you know of any other place, Detective Costello, where a tap and recording device was set up?

A. Not to my knowledge. I have no other idea of any other places they might have been tapped. I have nothing to do with them if they were." (A. 163-165.)

Frank Vedder (A. 167-172), a detective of the Nassau County Police Department, testified that he had been assigned to the Rackets Bureau of the District Attorney's Office for five years, and at some point between July 5, 1964 and September, 1964, at the request of Assistant District Attorney Levy, he listened to People's Exhibit 9 (a reel of tape from the Headline Bar tap). He knew that Detective Skuzenski and Detective Costello also listened to the tape. (A. 167-168.)

Harry Minett, a detective of the Nassau County Police Department, testified that he was assigned to the District Attorney's Racket Bureau and there came a time (date unspecified) when he removed a tape (People's Exhibit 10) from the wiretap recorder which had been installed on the telephone line of Patrissy's Restaurant. He replaced it with another tape. (R. 375-377.)

Frank Abromowitz, a detective of the Nassau County Police Department, testified that from June through September of 1964, he was attached to the District Attorney's Racket Bureau, and there came a time (date unspecified) when he listened and made notes concerning People's Exhibit 8 (from the wiretap of Patrissy's Restaurant) (R. 388-389).

Donald J. White (R. 172-186), a Confidential Reporter for the District Attorney of Nassau County, testified that on September 11, 1964, he was given ten reels of tape, identified as People's Exhibits 1 through 10, and he transcribed only those conversations which appeared on these tapes at certain designated meter readings. (A. 173.) He then put his transcriptions on stencils and made multiple copies of them. Prior to hearing the tapes, he had never before heard the voices of the persons whose voices had been recorded. His transcriptions differentiated between the different voices on the tapes by assigning each voice a number; thus, the first voice was designated "1" and the second voice was designated "2".* (A. 174-176.)

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* At the trial, copies of Mr. White's typewritten transcriptions were marked in evidence and given to the jury. (A. 230, 232.) The numerical designation given to the transcriptions followed that given to the reels of tape from which the transcriptions came. Thus, if two different conversations were transcribed from the reel of tape marked Exhibit 1, the transcriptions bore the

Joseph Tozzi (A. 186-195), a Sergeant of the Nassau County Police Department, testified that he was the commanding officer of the Nassau County District Attorney's Rackets Bureau. He had nine detectives and two patrolmen under his jurisdiction. One of his functions was to act as custodian of the various tape recordings. When an individual tape was not in the custody of one of the police officers in his squad, it would be in Tozzi's custody. (A. 186-187.) He also was the custodian of the District Attorney's wiretap equipment. (A. 190.) He would assign the tapes to various detectives for the purpose of monitoring and making notes concerning the contents of the tapes. (A. 191.) He was not able to estimate, nor would his records reveal, the total number of reels of tape which had been used in this investigation. (A. 191-192.) In order to obtain that figure, he would have to examine the last reel and ascertain the number which was on it. (A. 192.) He knew that every reel of tape in the investigation had been monitored. (A. 192.) He was not sure, but he estimated that four or five of his men had come to him to obtain the reels at various times. (A. 192-193.) No record was kept as to how many times a particular reel was requested for monitoring, nor was a record kept as to when a particular reel was out or who had it. He relied upon his memory in these matters. (A. 193.) He could not say how many recording machines had been requisitioned from his office during the investigation in this case, and he did not have with him the records which would reveal the number of tapping setups which had been used. (A. 194-195.) If a tape had been spliced,

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exhibit designations of "1-A" and "1-B" respectively. (A. 175-176.) The transcriptions of the Petitioner's two wiretapped conversations on the telephone of the Headline Bar, are reproduced in the Petitioner's Appendix, pages 269-296.

he could tell it, but if it had been spliced and played onto a new tape, it would be "very difficult for him to tell that there had been a splice." (A. 195.)

Pre-Trial Proceedings Concerning the Wiretaps

(a). *Petitioner is arrested and learns of electronic surveillance.*

At about 9:00 A. M. on July 15, 1964, the Petitioner was asked to come to the District Attorney's Office for questioning. He did so. (R. 1920.) He was questioned over a period extending until 7:30 P. M. that evening, at which time he was formally placed under arrest. (R. 1923-1924.) The thrust of the questioning appeared to be aimed at getting the Petitioner to sign a statement to the effect that he knew that Granello was demanding $25,000.00 from Holtzman. (R. 1924.) Tapes of conversations between Granello and Holtzman were played for the Petitioner. (R. 1924.) It was thus that the Petitioner first learned of the presence of electronic surveillance in the case. The Petitioner, together with Granello, Conte and four unknown persons, was indicted and arraigned on the following day. (A. 7, 9.)

(b) *September 2, 1964 Motion for inspection of the grand jury minutes and dismissal of the indictment.* (A. 45.)

By a Notice of Motion dated August 24, 1964, the Petitioner moved in the County Court of Nassau County for inspection of the grand jury minutes and for an Order dismissing the indictment. (A. 45.) In his supporting affidavit, the Petitioner's attorney recited that:

> "On information and belief, the evidence which was submitted to the Grand Jury was illegal and improper, and none but legal evidence should have been submitted.

Telephonic interceptions, being illegal, should not have been submitted to the Grand Jury as it was obtained as the result of unreasonable search and seizure, without the permission of the person affected. On information and belief, if any telephonic interceptions which were made, were not made pursuant to Section 813-a of the Code of Criminal Procedure, and if such telephonic communications were made pursuant to an order to wiretap, then such interception and Section 813-a are in violation of the Fourth Amendment. Telephonic interceptions or any wire tap evidence which were submitted to the Grand Jury, did not have any corroboration of identifying witnesses who could identify the voice of the defendant, Thomas Kaiser, with that on the alleged telephonic interception." (A. 47-48.)

The above motion was denied by the Court on the ground that the evidence submitted to the Grand Jury was sufficient to sustain the indictment. (A. 49.)

(c). *November 10, 1965, Motion for suppression of the wiretap recordings.* (A. 50.)

On November 10, 1965, there came on to be heard in the County Court of Nassau County a motion by the Petitioner for orders:

"... declaring unreasonable, illegal and void the interceptions of telephone communications ..."

in his case, and

"precluding the District Attorney from using as evidence upon the trial of the Indictment herein, the fruits of such intercepted telephonic communications obtained during the courses of, or as a result of the

said unreasonable, illegal and void interception." (A. 50.)

This motion also requested a hearing upon the foregoing matters. (A. 50-51.)

Each of the above requests was denied in an opinion, dated December 13, 1965, by Judge Dowsey of the County Court. Denial was not on the merits, but rather on the ground that no statutory authority existed for such a pre-trial review in relation to wiretap evidence. Judge Dowsey's opinion is reported at 48 Misc. 2d 868, 265 N.Y.S. 2d 1018. (A. 56-61.)

Trial Proceedings Concerning the Wiretaps

On May 31, 1966, the Petitioner's case was called to trial before the Hon. Albert A. Oppido, a Judge of the County Court of Nassau County, and a jury.*

Before the selection of the jury, the Petitioner moved for a hearing to determine the admissibility of the wiretap evidence against him. (A. 62.) The court held that the Petitioner had standing to contest the validity of the wiretaps and granted the motion for a hearing. (A. 68-70.) The minutes of the hearing appear at A. 70-97.

At the hearing, the Court stated that the purpose of the hearing would be to determine "*de novo* whether or not there exists reasonable cause for the issuance of the two wiretap orders; more specifically as to two telephone numbers." (A. 71.) The telephone numbers in question were specified as being the one from the Headline Club

* The case had previously been called to trial before a different judge, and twelve jurors were sworn, but the proceeding was discontinued due to a medical indisposition of the judge. (A. 12.)

and the two from Patrissy's Restaurant. (A. 71.) The Court received in evidence the two court orders which had been issued by Judge Spitzer on July 1, 1964, together with the accompanying petitions of Mr. Levy. (A. 75-76.) (The orders and Headline petition are reproduced in the Petitioner's Appendix at pages 17, 41-44.) Donald J. White, the district attorney's confidential reporter, testified as to his recording and transcribing of Mr. Levy's testimony before Judge Spitzer. (A. 78-83.) He said that the transcription included everything that was said between Judge Spitzer and Mr. Levy. (A. 81.) The transcription was then received in evidence (for the purpose of the hearing) by the Court (A. 83), and the People rested.

The Petitioner then pressed his motion for suppression of the wiretap recordings, specifying *inter alia* the following grounds:

1. Mr. Levy's Petition was legally insufficient (A. 84) in that there was no factual statement by Mr. Levy as to his informer's reliability, the informer (Holtzman) having been a convicted felon; Mr. Levy's testimony was unsubstantiated hearsay; and, there was no factual evidence showing that a crime was being committed or that a wiretap order would reveal evidence as to that particular crime. (A. 84-85.)

2. Even if the orders in question were properly issued, they were clearly inapplicable as far as the Petitioner Kaiser was concerned since he was not named in them. In short, the securing of his telephone conversation was the result of a fishing expedition that just happened to pick up his call. (A. 86.)

3. All wiretaps are violative of the Fourth and Fifth Amendments of the United States Constitution. (At this point, the Court requested that counsel not get into that area, since the point of view represented by this argument was held only by a minority of the State Court of Appeals.) (A. 86-87.)

The Court held that if the wiretap order had been based only on the affidavit of Mr. Levy, "there is no question that (the wiretaps obtained pursuant to the order) would be inadmissible." (A. 88.) The prosecutor concurred in that opinion. (A. 91.) However, the Court held that Mr. Levy's oral testimony before the issuing judge provided the necessary factual material. (A. 88.) The Court ultimately found that there was reasonable ground for the granting of the wiretap orders in both cases. (A. 97.) During the course of the hearing, the Court noted that he personally agreed with the minority view that "wiretaps *per se* shouldn't be allowed in because it is violative of the Fourth Amendment", but he found himself bound by prior decisions. (A. 94.) An exception was taken by the defense to the ruling of the Court. (A. 98.)

Introduction of the Wiretap Recordings at the Trial

After both sides had opened to the jury at the trial, there were marked for identification the various reels of the tape which contained those conversations which the People sought to introduce into evidence. They were marked as People's Exhibits 1 through 10 for identification. (A. 111-113.)

The two wiretapped telephone conversations in which the Petitioner participated appeared on the reel marked People's Exhibit 9. (A. 197-198.) The concersation which had been taken from the wiretap at Patrissy's Restaurant

(in which the Petitioner did not participate) was on the reel marked People's Exhibit 10. (A. 196.)

There were next marked the orders which had authorized the wiretapping at the Headline Bar and at Patrissy's Restaurant. These were marked People's Exhibits 11 and 12 respectively. (A. 113-115.)

The People then called to the stand those persons who had been involved in the installation of the various surveillance devices, and the securing, checking and transcribing of the conversations which had been seized. This testimony, as it relates to the Court ordered wiretaps, is summarized at pages 18-27, *supra*. The typewritten transcriptions of those conversations which the People sought to introduce into evidence were each marked for identification and given a numerical designation which corresponded to the numerical designation which had been given to the tapes from which they had been transcribed. (A. 174-176.) Thus, the Petitioner's two wiretapped conversations were marked, respectively, People's Exhibits 9-A and 9-B for Identification. (A. 175, 176.) The transcription of the wiretap from Patrissy's Bar was marked People's Exhibit 10-A for Identification. (A. 176.)

The judge then held a hearing, outside of the presence of the jury, for the purpose of listening to those conversations which the prosecution sought to introduce into evidence. (A. 195-219.) The Patrissy's Restaurant tap (Exhibit 10) was played at A. 196. The taps from the Headline Bar were played at A. 197-198.

During the course of the hearing, the Prosecutor urged that the jury be provided with the typewritten transcripts of the conversations on the ground that parts of the tapes

would have to be played a number of times to be understandable. (A. 202.)

The Court found that the transcripts clearly reflected the content of the recorded conversations and that the recordings were clear, identifiable in tone and substance. (A. 211.) The Petitioner objected to the admission of all the tape recorded conversations on the ground that they did not reveal a conspiracy in which the Petitioner took part (A. 212), that the taps were taken after the termination of any conspiracy (A. 213-214), that the jury would not be able to follow the court's charge concerning the interpretation of the taps (A. 215-216), and that the tapes included meaningless material which went "nowhere and" had "no probative force." (A. 218-219.)

Irving Holtzman was called to testify in behalf of the People. Out of the hearing of the Jury, he was called upon to identify the voices which appeared on the various tapes which had been marked for identification. (A. 222-227.) He identified the voices in the two conversations of People's Exhibit 9 as being those of Thomas Kaiser (the Petitioner) and Dino Conte. (A. 223-227.)* He identified the voices in the conversations of People's Exhibit 10 as being those of Rocky Graziano and Sally Burns (Granello). (R. 1104-1107.) The jury was then called in and Holtzman identified the participants in the various conversations again, in the presence of the jury. As he went through the identification process for each conversation, it was admitted into evidence, and played for the jury. (R. 1111-1435.) The procedure for the two conversations which ap-

* During the trial, the prosecutor revealed to the Court that Holtzman "has heard this tape played on many occasions" (R. 1452) and, "he's heard that tape ad infinitum." (R. 1454.)

peared on Exhibit 9 (the Headline wiretaps in which the Petitioner was one of the participants), and the respective transcriptions of these conversations (Exhibits 9-a and 9-b) appears at A. 227-233. The Exhibit 9-a conversation was received into evidence at A. 230, the transcription was distributed to the jury, and the conversation was played for the jury at A. 230. The Exhibit 9-b conversation was received into evidence at A. 232, the transcription was distributed to the jury and the conversation was played for the jury at A. 233. As to each, the Petitioner entered his objection that the exhibits were incompetent, immaterial, irrelevant and had no probative force. The objections were overruled. (A. 229; 232.)

The Prosecution did not offer into evidence the recorded conversation which had been seized from the public telephone at Patrissy's Restaurant.

The Prosecution's Characterization of the Petitioner's Wiretapped Conversations as Being an Absolute Unqualified Confession.

In his opening address to the jury, the Prosecutor declared that the defendant's wiretapped conversation was "an absolute, complete admission of his part and parcel in this conspiracy." (A. 106.) In his summation, the prosecutor's expressed thoughts concerning the character of these conversations underwent an evolution. He commenced by telling the jury that the tapped conversation "goes further than being an admission, which I say to you, were this said to a police officer, would be an absolute, absolute confession. . . . " (A. 247.) Then, referring to the Petitioner, the prosecutor stated "because on Exhibit 9-a and 9-b he confessed to that. . . . " (A. 248.) This was fol-

lowed by "Now what do you have Mr. Kaiser saying in this confession?" (R. 2576), and "That's the plain word meaning. That's an admission, a confession." (A. 249.) Finally, at the close of the prosecutor's summation, the defendant's taped words became an absolute unqualified confession:

> "You have here a conspiracy shown through the acts of one conspirator coupled with absolute unqualified confession on People's Exhibits 9a and 9b by this defendant, Thomas Kaiser." (A. 249.)

Based upon the above characterizations, the defense moved for the withdrawal of a juror (declaration of a mistrial). (A. 250.) There was an extended colloquy on the question, in which the Court made clear that it would not characterize the wiretapped conversations as confessions (A. 250-253) and stated:

> "Well, I'm concerned about it. There is no question I'm concerned with it. And, I'll tell you frankly, Mr. Doolittle, I'm quite upset after a month's trial, after your statement I'm quite upset about it." (A. 252.)

The Court revealed that he had not said anything during the Prosecutor's summation because he would just highlight the error. (A. 252.)

The defense motion for a mistrial was denied, and counsel requested that the Court attempt to cure the error in his charge. (A. 253.) In his charge, the Court merely defined the distinction between an admission and a confession. (A. 258.) No instruction was given that there was no confession in the case.

The Defense

In view of the serious question posed by the above mentioned references to the Petitioner's conversations, we believe it appropriate to submit to this Court the Petitioner's version of the meaning of those conversations. The Petitioner took the stand in his own defense. He testified that he had known Dino Conte from boyhood—for over fifteen years. They had grown up in the same neighborhood. (R. 1853.)

He had met Irving Holzman in the beginning of 1963 at a time when he had bought a Bar together with a partner in Richmond Hill. At that time he met one Robert Luttman, an employee of Irving Holzman, and was introduced by Luttman to Holzman. During this period he borrowed money from Holzman in connection with a Bar known as the Imperial Room, a loan which the defendant paid off. (R. 1862.) During the latter part of 1963, Irving Holzman wanted to have the defendant become interested and operate a series of Bars and Grills in which Holzman had become interested. These never materialized. (R. 1870-1875; 1877-1885.)

The defendant also testified that he knew Salvatore Granello, also known as Sally Burns. He testified that he first saw him in April, 1964 in the Headline Bar located on West 43rd Street, Manhattan. (R. 1887.) At the time, his friend Dino Harris (Conte) was manager of the Headline Bar. Kaiser occasionally helped at the Bar on weekends. He occasionally saw Granello (Burns) there but was never introduced to him. (R. 1887, 1889.) The defendant testified that sometime in May of 1964 his friend Dino Conte asked him who Irving Holzman's partners were. (R. 1901, 1902.) Kaiser learned about Holzman's business dealings from Robert Luttman. (R. 1903.) Kaiser further

testified that he gave Dino Conte additional information which he requested about the relationship between Holzman and Luttman. He said that he discussed what percentages Holzman and Luttman had between them and as to who was the senior partner. (R. 1915.) Kaiser testified that he was giving information to Dino about Holzman concerning the nature of the routes and location, the percentages that Luttman and Holzman had over their business enterprise. (R. 1917-1918.)

All the way through Kaiser's extensive testimony, both on direct and cross-examination, he stated that the information which he gave to Dino either on the wiretap that was placed before the jury or personally, was information which he had obtained from Luttman. (e.g., R. 1919.)

Throughout his testimony, Kaiser maintained that he was not aware that Granello was involved in a criminal enterprise. Repeatedly during his testimony, he stated that he was merely furnishing information obtained from Luttman and that such information was given by him in the belief that it concerned a business relationship between Granello and Holzman, the details of which he did not know. (e.g., R. 1925.) The burden of his lengthy direct and cross-examination concerning the wiretaps is to the effect that he was not a conscious part of any conspiracy, or of any coercive tactic, nor was he engaged in any extortion attempt. (R. 2081-2423; 2460-2469.)

At the time of his arrest, the authorities played some of the tapes for Kaiser. (R. 1925.) He told the arresting officer that he didn't understand the true nature of what had been going on between Granello and Irving Holzman. He said he thought that they were discussing a business

negotiation stemming from a great deal of money that Holzman owed from years back. (R. 1925.) Kaiser denied that he was a part of any conspiracy and volunteered to take a lie detector test but was not given one. (R. 1926-1927.)

The basic question for the jury's resolution was whether the defendant ever became a co-conspirator with Conte and Granello.

Summary of Argument

1. The introduction to our argument emphasizes the new and unique problems created by wiretapping in a telephone structured society (p. 43). We show that wiretapping poses a grave threat to individual privacy, security and dignity. No analogy to wiretapping can be found in the pretelephone era. It involves not only the unavoidable presence of a third party, but also his unknown presence. The fears thus raised involve serious questions concerning whether the atmosphere thereby generated is conducive to the spirit of liberty and respect for lawful authority which ought prevail in a free society (p. 45). Additionally, evidence obtained by wiretapping is inherently unreliable. This is so for a number of reasons:

Conversations are taken out of the context of personal experience which the conversants share with each other (p. 46); a defect in an automatic recording machine, used for wiretapping, or in its source of power can cause whole words or sentences to be eliminated from the tape recording (p. 47); and careful editing and re-recordation can completely alter what was said with no detectable evidence that this has been done (p. 48). Except under the most ideal of circumstances, wiretapping is indiscriminate. If any phone may be tapped then every phone must be viewed

as being tapped (p. 46). Additionally, the unparalleled dredging of the personal lives of those who chance to call to or from a tapped telephone, creates grave difficulties concerning public dependence upon the personal integrity of the officials who are charged with reviewing the seized conversations (p. 47). Finally, we urge that wiretapping be given a different and more fundamental treatment than other search and seizure situations (p. 48).

2. We then argue (p. 49) that since wiretap evidence seized in violation of the Federal Communications Act is inadmissible in a State criminal proceeding, the Petitioner's conviction should be reversed. For this result, we rely upon a prospective application of *Mapp* v. *Ohio*, 367 U.S. 643 (p. 52), and, alternatively, upon a limited retroactive application of *Lee* v. *Florida*, —— U.S. ——, 88 S.Ct. 2096 (p. 53), and upon the fact that the prohibitions involved do not come as a surprise to the prosecutive and judicial officials of the State of New York, but rather, that those officials deliberately chose to violate the unequivocal mandates which they were constitutionally bound to obey (p. 54).

3. For the purpose of fortifying the Petitioner's request for a reversal of his conviction, and in the belief that a system of ordered liberty requires the resolution of the basic Fourth Amendment problems created by wiretapping, we argue that the Federal Communications Act was a device through which telephone conversations were placed within the realm of privacy which is protected by the Fourth and Fifth Amendments. The significant feature of this argument is that the absolute prohibition contained in the Act consequently made unreasonable, within the meaning of those Amendments, any search for telephone conversations (p. 58).

4. We conclude Point I by urging that, aside from the complete wiretap ban imposed by Section 605, the Federal Constitution, itself, imposes a similar ban. The first aspect of this theory depends upon the interaction between the reserved rights provision of the Ninth Amendment and the search and seizure provision of the Fourth Amendment. We reason that the Ninth Amendment prevents the novel invasion of privacy presented by wiretapping from automatically being incorporated into the Fourth Amendment grant of a limited right to search and seize, and this can be accomplished only by amendment of the Constitution. The second aspect of our theory depends upon the effective similarity between wiretapping and testimonial compulsion. We urge that the Fifth Amendment thus imposes an absolute ban upon wiretapping. The individual's defenses being down, as to intrusion by third parties, no distinction can be drawn between this and the medical pumping of his body or his mind (p. 61).

5. In POINT II, we urge that Section 813-a of the New York Code of Criminal Procedure is unconstitutional on its face as being violative of the Fourth and Fourteenth Amendments. We rely upon this Court's decision in *Berger* v. *New York,* 399 U.S. 41, a "bugging" case, which specifically held that statute to be unconstitutional. This Court's decision in *Katz* v. *United States,* 389 U.S. 347, is urged as having removed any question that the decision in *Berger* is equally applicable to wiretapping (p. 63).

6. In POINT III we charge that the wiretap order which resulted in the seizure of the Petitioner's conversations was unconstitutional in its origins, on its face, and in its implementation. We first establish that the order was not issued upon a showing of probable cause that the sought after

evidence would be obtained by the tapping of the telephone in question (p. 67). Additionally, we urge that permission for wiretapping should require a particular showing of necessity beyond that called for in the ordinary search and seizure application (p. 69).

7. Continuing on Point III, we attack the order as authorizing a general search of sixty days duration. We take *Berger's* specific analysis of Section 813-a, apply it to the order issued in the present case, and show that the shortcomings found in the statute exist identically in the order (p. 70). We utilize this Court's holding in *Katz* v. *United States,* 389 U.S. 347 to demonstrate that the officers who execute a search warrant must act upon prior judicial restraint, and not upon self-imposed restraint (p. 74). The *carte blanche* authorization given by the order herein was the equivalent of a general warrant. We round out our demonstration of the unrestrained and unsupervised invasion of Fourth Amendment rights by showing that the wiretap order did not provide for a return, nor was there in fact a return made (p. 76).

8. Applicable as well in Point III is the argument made under Point I, that the Ninth and Fifth Amendments imposed an absolute ban upon wiretapping (p. 61).

9. Our final argument under Point III is that the broad grant of wiretapping in the present case, covering a number of telephones, so compounded the unconstitutionality of the search as to make it decisively deprive the wiretapping of any semblance of due process. We note that we intend to move this Court for an order directing the District Attorney of Nassau County to deliver to this Court an inventory of all wiretap orders applied for, granted and

implemented in the present case, as well as all of the actual recorded tapes produced by the wiretapping in the present case (p. 78).

10. POINT IV urges that since the wiretapping herein constituted a direct violation of the Petitioner's Fourth Amendment rights against unlawful searches and seizures, his conviction should be reversed by a simple prospective application of *Mapp* v. *Ohio*, 367 U.S. 643, and, in any event, this case comes to this Court in the appellate process. *Linkletter* v. *Walker*, 381 U.S. 618, 622 (p. 80).

11. POINT V, our final point, involves the prosecutor's repeated references, in his summation to the jury, characterizing the Petitioner's wiretapped conversations as confessions (p. 81), and going to the extreme of calling them an "absolute, unqualified confession" (p. 83). Aside from the basic question of due process raised by the prosecutor's conduct, the prejudice to the Petitioner was compounded by two factors: This Court rendered its decision in the well publicized and much debated case of *Miranda* v. *Arizona*, 384 U.S. 436, during the course of the Petitioner's trial; and, the written transcripts of the Petitioner's conversations, to which the prosecutor referred as he made the above-quoted comment, created the aura of a *written* confession (p. 84). We urge that these factors effectively deprived the Petitioner of his rights as specified in the Fifth Amendment and guaranteed by the Fourteenth Amendment; we conclude that it would indeed be anomalous if a prosecutor may falsely impute a confession to a defendant, but in the case of certain persons who have actually confessed, reference to the actual confession requires the reversal of a conviction (p. 85).

ARGUMENT

Introduction to Argument

"The subject of this Essay is . . . the nature and limits of the power which can be legitimately exercised by society over the individual. A question seldom stated, and hardly ever discussed, in general terms, but which profoundly influences the practical controversies of the age by its latent presence, and is likely soon to make itself recognized as the vital question of the future. It is so far from being new, that in a certain sense, it has divided mankind, almost from the remotest ages; but in the stage of progress into which the more civilized portions of the species have now entered, it presents itself under new conditions, and requires a different and more fundamental treatment." *On Liberty,* John Stuart Mill, 1859, Introductory.

When Mill penned the above words, he could little have imagined the technological advances which now permit practically every individual, as a matter of course, to communicate with every other individual by instantaneous telephonic communication. This development has vastly broadened the barriers of time and space which formerly limited direct personal communications between individuals. Society and individual relationships have naturally adapted to this change and have thus, themselves, been transformed —no longer being structured upon the necessity for face to face communication, but, rather, liberated through the ready availability to all of this new form which in most cases can provide a complete and virtually interchangeable substitute for the old.

While having, in a very real sense, increased the freedom of the individual, the telephone has brought with it a host of new threats to that freedom. Individuals, living in a society which is structured upon face to face personal communication, were easily able to make adequate provision for the privacy of such communication. A society which has, however, been structured upon the use of the telephone, has made individual relationships susceptible to the undesired presence of third parties. This aspect of wiretapping is analogous to an interloper of the pre-telephone era having legal authority to remain within arm's reach of an individual whose personal conversations he wished to overhear. The writer is unfamiliar with any precedent in civilized jurisprudence which permitted such a rape of human dignity in the absence of official custody situations.

But, wiretapping is more than the simple presence of an undesired third party. A man in custody is aware of the circumstances in which he finds himself; he knows that there is a third party present. The presence of the wiretapper is not only unwanted, it is also unknown. The telephone caller has thus been deprived of the opportunity to take into account the presence of the third party in determining whether he will speak at all, and, if so, in what terms he will speak. In the United States, where there is one telephone for every two living human beings, there must, without doubt, be millions of telephone conversations held each day in which comments of a non-criminal nature are made which would remain unsaid if it were believed that a third party were listening in. It is no answer to state that most persons realize that telephone conversations can be tapped. The fact is that our telephone structured society operates, for the most part, upon the assumption that no one is listening in. It may well be that a

number of persons do refrain from speaking freely on the telephone for fear of intrusion, but that itself raises serious questions concerning whether the atmosphere thereby generated is conducive to the spirit of liberty and respect for lawful authority which ought prevail in a free society. Perhaps more than most other types of official conduct, the dreadful aura of a police state is raised by this awareness of official wiretapping. The recent report of a Presidential Commission partially set forth the problem:

> "In a democratic society privacy of communication is essential if citizens are to think and act creatively and constructively. Fear or suspicion that one's speech is being monitored by a stranger, even without the reality of such activity, can have a seriously inhibiting effect upon the willingness to voice critical and constructive ideas. When dissent from the popular view is discouraged, intellectual controversy is smothered, the process for testing new concepts and ideas is hindered and desirable change is slowed. External restraints, of which electronic surveillance is but one possibility, are thus repugnant to citizens of such a society." *The Challenge of Crime in a Free Society*, A Report of the President's Commission on Law Enforcement and Administration of Justice (1967), page 202.

Critical or constructive ideas, in the sense apparently meant by the Commission, form only a small part of those communications which are likely to be inhibited; what of those innumerable communications which have relevance only to the personal lives of those speaking and are the basic stuff of human relationships?

There is a second difficulty associated with the unknown presence. When human beings communicate, they often speak within the context of personal experience which they share with each other. If they believe themselves to be alone, they will speak in a shorthand which incorporates that context. Thus, a communication which has a clear meaning to the conversants, may have no meaning or an altogether different meaning to the eavesdropper. Similarly, a private comment, serious in tone, can be clearly understood by the parties to be made in jest, but misunderstood by the eavesdropper. The point is that if the presence of a strange third party is known, the parties to a conversation will alter their mode of expression so as to make their meaning clear to the third party.

Aside from the presence of the wiretapper being unwanted and unknown, it is, except under the most ideal of circumstances, indiscriminate. Such ideal circumstances will rarely be found, and thus, the wiretapper will find himself privy to conversations, not only of his subject, but quite probably of a number of other individuals. In the absence of a tapping device which can be programmed to pick up only the voices of certain individuals or only certain types of conversations, anyone who uses the telephone under surveillance will be heard. If law enforcement authorities may tap a phone which is available to the general public, then every such telephone must be viewed as pipeline to secret official surveillance. If law enforcement authorities may tap a private telephone, then all those who are within family or business groups which use such telephones, and all those who have reason to communicate with such groups, must view the instrument as possibly being such a pipeline.

Automatic recording devices of the type which were used in the present case multiply the problems which have been set forth above. Such devices are unattended by a human censor and are completely lacking in discrimination. They are purported to form a complete permanent record of what has been said (although not necessarily of what has been *communicated,* since what has been communicated may be realized only by the communicating parties). This unparalleled dredging of the personal lives of those who chance to call to or from the telephone instrument in question creates grave difficulties concerning public dependence upon the personal integrity of the officials who are charged with weeding out from the mass of conversation obtained only that information which they are lawfully seeking. The opportunity for the corrupt use of the irrelevant information is manifest.

Realizing the practical impossibility, in most cases, of limiting surveillance only to the reception of the particular information sought, it is likewise a practical impossibility for a judicial officer to review all of the information actually seized—both that which allegedly is relevant and that which allegedly is not. No one but the wiretapper need ever know all of what he has heard; no other person will be in a position to know that certain of the wiretapper's future conduct resulted from what he had heard.

A second aspect of the tape recordation of telephone conversations concerns the dependability of the final product which is presented to a judge or jury. A defect in the recording machine or in its source of power can cause whole words or sentences to be omitted from the tape recording, thus changing the meaning of what was said,

and no one—not even the wiretapper—would be the wiser. Additionally, it is common knowledge that by careful editing and re-recordation, individual words or sentences can be created with no detectable evidence that this has been done.

Our argument will, in the main, rely upon legal precedent to establish that the wiretapping conducted in the present case was in violation of both statutory and constitutional mandates. It must, however, be realized that the problems posed by wiretapping find no precedent in the human experience which produced the United States Constitution and its Bill of Rights. The official intrusion into human privacy which is occasioned by wiretapping finds no analogy in the pre-telephone era. In the words of Mill, above quoted, this Court is called upon to give wiretapping "a different and more fundamental treatment." The mere comparison by analogy to other, essentially different, seizure situations, would assume a basic similarity which does not, in fact, exist.

POINT I

The Wiretapping of the Petitioner's Telephone Conversations Was in Direct Violation of the Federal Communications Act (48 Stat. 1064, 1103, 47 U.S.C. 605) and Article VI of the United States Constitution; the Use of Those Conversations as Evidence Against the Petitioner Was Thus in Violation of Federal Organic Law and of the Petitioner's Right to Due Process of Law as Guaranteed by the Federal Fourteenth Amendment and as Specified in the Federal Fourth, Fifth and Ninth Amendments.

A. Wiretap Evidence Which Is Secured in Violation of the Federal Communications Act Must Be Excluded in State Criminal Prosecutions.

The indictment and conviction of the Petitioner were completely dependent upon the use against him of certain of his telephone conversations which were seized by State Officials through the use of wiretapping. These interceptions and the use of the evidence obtained thereby were without the authorization of the Petitioner or of the other party to the telephone conversations in question. Independent of the evidence so obtained, the People of the State of New York clearly and stipulatedly were possessed of nothing which implicated or tended to implicate the Defendant in the crimes of which he was convicted (page 7, *supra*).

Section 605 of the Federal Communications Act (48 Stat. 1064, 1103, 47 U.S.C. § 605) was in effect during all of the period covered by the events of the present case; the Statute continued in effect during all of the proceedings in the

Courts below. That Statute provided, in pertinent part, as follows:

> "... no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect or meaning of such intercepted communication to any person ..."*

In *Lee* v. *Florida*, —— U.S. ——, 88 S.Ct. 2096 (1968), this Court reaffirmed what it had previously held in *Benanti* v. *United States*, 355 U.S. 96 (1967): wiretapping by State officials and the introduction of the fruits of such wiretapping at a State trial violate the clear prohibitions of Section 605. *Lee* went further, however, and declared that a State conviction will not be permitted to rest upon evidence so obtained:

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* Since the grant of certiorari in the present case, Federal statutory law concerning wiretapping has undergone a complete revision. Title III of the *Omnibus Crime Control and Safe Streets Act of 1968* created, *inter alia*, a comprehensive scheme of permissive wiretap legislation applicable to wiretapping by both Federal and State officials (18 U.S.C., Chapter 119). Section 605 was amended so as to prohibit all wiretapping other than that permitted by the new legislation.

We shall, during the course of our argument, demonstrate that the procedures followed in the instant case fall far short of those required by the new legislation. While the new legislation cannot, and does not purport to, retroactively validate earlier accomplished wiretapping, such a comparison is instructive in revealing the current Congressional feeling concerning minimal standards which ought be required for wiretapping. We, of course, do not suggest that the new legislation complies with Federal Constitutional requirements.

For the convenience of the Court, the text of Title III is reproduced in Appendix B, hereto, *infra*.

"• • • In the *Mapp* case, the Court in overruling *Wolf* imposed a judicially devised exclusionary rule in order to insure that a State could not adopt rules of evidence calculated to permit the invasion of rights protected by Federal organic law. In the present case the Federal law itself explicitly protects intercepted communications from divulgence, in a court or any other place.

"But the decision we reach today is not based upon language and doctrinal symmetry alone. It is buttressed as well by the 'imperative of judicial integrity.' *Elkins* vs. *United States,* 364 U.S. 206, 222. Under our Constitution no court, State or Federal, may serve as an accomplice in the willful transgression of 'the Laws of the United States,' laws by which 'the Judges in every State (are) bound. . . .'

"Finally, our decision today is counseled by experience. The hope was expressed in *Schwartz* vs. *Texas* that '(e)n-forcement of the statutory prohibition in § 605 can be achieved under the penal provisions' of the Communications Act. 344 U.S., at 201. That has proved to be a vain hope. Research has failed to uncover a single reported prosecution of a law enforcement officer for violation of § 605 since the statute was enacted. We conclude, as we concluded in *Elkins* and in *Mapp,* that nothing short of mandatory exclusion of the illegal evidence will compel respect for the Federal law 'in the only effectively available way—by removing the incentive to disregard it'. *Elkins* vs. *United States,* 364 U.S., at 217." —— U.S. ——, 88 S.Ct. 2096, 2101.

The prosecution and conviction of the Petitioner having been completely dependent upon the use in evidence of his wiretapped conversations, his case falls squarely within the above enunciated ruling.

B. The Exclusionary Rules Which Pertain to Evidence Secured in Violation of the Federal Communications Act Apply to the Petitioner's Case and His Conviction Should Be Reversed.

Lee v. *Florida, supra,* made clear that the proper application of this Court's decision in *Mapp* v. *Ohio,* 367 U.S. 643 (1961), rendered inadmissible in a State criminal trial any evidence which had been obtained in violation of Section 605 (88 S.Ct. 2096, 2100-2101). All of the events in the present case, including the issuance of the wiretap orders, occurred after the *Mapp* decision. A prospective application of *Mapp* thus requires that the Petitioner's conviction be reversed.

We submit that no genuine issue of retroactivity may be raised in this case. The reasons for this assertion are as follows:

1. The basic rationale of *Mapp* would be effectively nullified if the exclusionary timetable were altered for each different means or object of search and seizure presented to this Court. *Mapp* declared the basic rule which is applicable to all illegal search and seizures in that "... the exclusionary rule is an essential part of both the Fourth and the Fourteenth Amendments ..." 367 U.S. 643, 657. No concept of ordered liberty could reasonably adopt a shifting schedule of exclusion within the search and seizure area, dependent upon method or object of search.

2. Even if *Lee* v. *Florida, supra,* were considered to be pivotal decision for the running of a new exclusionary timetable specifically concerning the seizure of telephone conversations, consistency would require that the basic search and seizure timetable enunciated by this Court should apply to the seizure of telephone conversations. Thus, if the Petitioner's case involves a retrospective application of *Lee,* rather than a prospective application of *Mapp,* the search and seizure rulings of this Court, as exemplified by *Linkletter* v. *Walker,* 381 U.S. 618 (1965), would still require that the Petitioner's conviction be reversed. This is made clear by a simple replacement of the citation to *Mapp* with a citation to *Lee* in the following excerpt from *Linkletter*:

> "Initially we must consider the term 'retrospective' for the purposes of our opinion. A ruling which is purely prospective does not apply even to the parties before the court. • • • However, we are not here concerned with pure prospectivity since we applied the rule announced in *Mapp* to reverse Miss Mapp's conviction. That decision has also been applied to cases still pending on direct review at the time it was rendered. [*Ker* v. *State of California,* 374 U.S. 23 (1963); *Fahy* v. *State of Connecticut,* 375 U.S. 85 (1963); *Stoner* v. *State of California,* 376 U.S. 483 (1964).]* Therefore, in this case, we are concerned only with whether the exclusionary principle enunciated in *Mapp* applies to state court convictions which had become final before rendition of our opinion. [By final we mean where the judgment of conviction was

* Footnotes in the original opinion are here included as bracketed references.

rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed before our decision in *Mapp* v. *Ohio*.]" 381 U.S. 618, 622.

3. In applying the *Mapp* and *Lee* decisions to the present case, no problem can be presented by any claim of surprise on the part of State officials. The law enforcement officials and courts of the State of New York have been on clear notice, at least since this Court's opinion in *Benanti* v. *United States*, 355 U.S. 96 (1957), that wiretapping by State officials, even when done pursuant to Section 813-a of the New York Code of Criminal Procedure, is a direct criminal violation of the prohibitions contained in Section 605 of the Federal Communications Act. The wiretapping which was done in *Benanti* was done pursuant to Section 813-a of the New York Code of Criminal Procedure, and, similarly to the present case, the wiretapping was done upon the wires of a public bar. 355 U.S. 96, 97.

By that decision, this Court put an unequivocal end to the argument that the Constitution and statutes of the State of New York provided legitimate authority for the wiretaps:

> "The Federal Communications Act is a comprehensive scheme for the regulation of interstate communications. In order to safeguard those interests protected under Section 605, that portion of the statute pertinent to this case applies both to intrastate and to interstate communications. • • • (K)eeping in mind this comprehensive scheme of interstate regulation and the public policy underlying Section 605 as part of that scheme, we find that Congress, setting out a prohibition in plain terms, did not mean to allow State legislation which

would contradict that section and that policy." 355 U.S. 96, 104-106.

There could have been no reasonable doubt that State respect for this prohibition was Constitutionally mandated. Article Six, Clause Two of the Federal Constitution, commonly known as the Supremacy Clause, provides as follows:

> "This Constitution *and the laws of the United States* which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every state shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." (Emphasis added.)

Likewise, State authorities have been on notice since the 1961 decision in *Mapp,* that evidence seized in violation of Federal law may not be used in a State prosecution. Mapp's emphasis upon the observance of due process in the administration of criminal justice by the States completely changed the constitutional context in which the criminal act of wiretapping by State police officers had to be examined. *Mapp* made it clear that the effects of lawless behavior by State police officers in securing evidence would no longer be left to the discretionary rules of state practice:

> "Today we once again examine Wolf's constitutional documentation of the right to privacy free from unreasonable state intrusion, and, after its dozen years on our books, are led by it to close the only courtroom

door remaining open to evidence secured by official lawlessness in flagrant abuse of that basic right, reserved to all persons as a specific guarantee against that very same unlawful conduct. We hold that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a State Court." 367 U.S. 643, 654-655.

"Moreover, our holding that the exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments is not only the logical dictate of prior cases, but it also makes very good sense. There is no war between the Constitution and common sense. Presently, a federal prosecutor may make no use of evidence illegally seized, but a state's attorney across the street may, although he supposedly is operating under the enforceable prohibitions of the same Amendment. Thus the State, by admitting evidence unlawfully seized, serves to encourage disobedience to the Federal Constitution which it is bound to uphold. Moreover, as was said in *Elkins*, 'the very essence of a healthy federalism depends upon the avoidance of needless conflict between state and federal courts'." • • • 364 U.S. 643, 657-658.

"Federal-state cooperation in the solution of crime under constitutional standards will be promoted, if only by recognition of their now mutual obligation to respect the same fundamental criteria in their approaches. 'However much in a particular case insistence upon such rules may appear as a technicality that inures to the benefit of a guilty person, the history of the criminal law proves that tolerance of shortcut methods in law enforcement impairs its enduring ef-

fectiveness'. *Miller* v. *United States,* 1958, 357 U.S. 301, 313." 367 U.S. 643, 657-658.

Indeed, the trial judge, during the course of the pre-trial wiretap hearing in the present case, expressed the opinion that the wiretaps should have been excluded for failure to comply with Federal standards, but found himself bound by the decisions of the State Court of Appeals. (A. 86-87, 94.)*

It is thus clear that the prohibitions involved come not as a surprise to the prosecutive and judicial officials of the State of New York, but rather, that those officials deliberately chose to violate the unequivocal Federal mandates which they were Constitutionally bound to obey.

In considering whether any proceedings based upon such a blunt defiance of Constitutional, judicial and prosecutive duty should be held legitimate, reference is made to the following section of the dissenting opinion of Mr. Justice Brandeis in *Olmstead* v. *United States,* 277 U.S. 438 (1928). It was quoted with approval in this Court's opinion in *Miranda* v. *Arizona,* 384 U.S. 436, 479-480 (1966), and its message could not be more timely:

"Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will

* Prior to the wiretapping in the present case, a number of New York State Judges had likewise concluded that Section 605 required the exclusion of wiretap evidence. See, for example: *People* v. *Dinan,* 11 N.Y. 2d 350, 229 N.Y.S. 2d 406 (1962) (dissenting opinion in which three judges joined); *In re Telephone Communications,* 9 Misc. 2d 121, 170 N.Y.S. 2d 84 (N.Y. Sup. Ct., 1958); *Application for Interception of Telephone Communications,* 23 Misc. 2d 543, 198 N.Y.S. 2d 572 (N.Y. Ct. Gen. Sess., 1960).

> be imperilled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a law breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means • • • would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face." 277 U.S. 438, 485.

For the above reasons, this Court's holdings in *Benanti, Mapp* and *Lee* require the reversal of the Petitioner's conviction.

C. The Federal Communications Act Brought Telephone Conversations Within the Realm of Privacy Which Is Protected by the Federal Fourth and Fifth Amendments, and the Search for and Seizure of Such Conversations Was Unreasonable in a Constitutional Sense by Virtue of the Absolute Prohibitions of the Act.

We have established above that Section 605 requires the exclusion of wiretap evidence in State prosecutions and we have argued that this requirement should apply so as to reverse the conviction of the Petitioner herein. In doing so, we have relied upon the reasoning of *Lee* v. *Florida, supra,* which did not reach the issues raised under the Fourth and Fourteenth Amendments. —— U.S. ——, 88 S.Ct. 2096, 2097, footnote 2. We shall here and under Point II, *infra,* urge that serious Fourth, Fifth, and Fourteenth Amendment questions are raised by the wiretapping

in the instant case, and that the resolution of those questions should be dealt with directly by this Court so as to eliminate the state of confusion now existing concerning whether any wiretapping at all is Constitutional, and, if so, under what circumstances. A system of ordered liberty requires such a resolution. In the event that this Court does not choose to apply its holding in *Lee* v. *Florida, supra,* so as to require the reversal of the Petitioner's conviction, we urge that these Constitutional considerations require such a reversal.

We here argue that the interaction between Section 605 and the Fourth and Fifth Amendments extended the reach of those amendments and required the exclusion of the wiretap evidence; more specifically, Section 605 was a device through which telephone conversations were placed within the realm of privacy which is protected by the Fourth and Fifth Amendments, and the absolute prohibition contained in Section 605* made unreasonable, within the meaning of those Amendments, any search for telephone conversations.

There can be no doubt that Congress intended by Section 605 to protect the privacy of communications. In effect, Section 605 was a clear expression of the public policy of the United States concerning the privileged character of electronic communication. This statute, by its terms, conferred a right of privacy upon individuals engaged in telephone conversations, and declared telephone communications to be a legislatively protected area. Cf. *Nardone* v. *United States,* 302 U.S. 379, 384 (1937).

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* "No person not being authorized by the sender may intercept any communication . . . "

The Fourth Amendment provides that the right of the people to be secure in their persons, houses, papers and effects shall not be violated.

As was stated in *District of Columbia* v. *Little*, 178 F. 2d 13, 17 (D.C. Cir., 1949) aff'd 339 U.S. 1, this Amendment:

> ". . . did not confer a right upon the people. It was a precautionary statement of a lack of Federal power coupled with a rigidly restricted permission to invade the existing right. The right guaranteed was a right already belonging to the people. The reason for the search warrant clause was that public interest required that personal privacy be invadable for the detection of crime, and the Amendment provided the sole and only permissible process by which the right of privacy could be invaded. To view the Amendment as a limitation upon an otherwise unlimited right of search is to invert completely the true posture of rights and the limitations thereon."

In this second phase of our argument we urge that Section 605 extended the individual's right of privacy to his telephone conversations; it broadened the enclave of privacy to which the individual may lay claim under the Fourth, Fifth and Fourteenth Amendments, regardless of whether those Amendments would otherwise directly provide such protection. Although Congress may not restrict the application of a fundamental Constitutional guarantee, it may, when acting within its legitimate area of authority —here, interstate communications—confer additional rights upon the individual, which rights, by their nature, are drawn within the protection of the Constitutional guaran-

tee. The validity of this line of reasoning becomes apparent by analogy to property rights. If the United States Congress should grant a property right of any kind to an individual, that new property right would be drawn within the protection of the Fourteenth Amendment guarantee which prohibits the States from depriving any person of property without due process of law. In the present case, Congress has granted an added right of privacy, and has made that added right absolute; that added right was drawn within the protection of those Amendments which have the function of protecting privacy—the Fourth, Fifth and Fourteenth Amendments. The absolute prohibition contained in Section 605 thus made all wiretapping *per se* Constitutionally unreasonable.

D. Insofar as the Invasion of Privacy Involved in Wiretapping Was Not Contemplated by the Constitution and the Bill of Rights, the Ninth Amendment Should Be Interpreted so as to Prohibit All Wiretapping; Insofar as Wiretapping Is a Form of Testimonial Compulsion, the Fifth Amendment Should Be Interpreted so as to Prohibit All Wiretapping.

Since, under this point we have been discussing the absolute ban imposed by Section 605 upon wiretapping, we will here advance the Fifth and Ninth Amendments of the Federal Constitution as providing a similar absolute ban.

The Ninth Amendment provides that "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." As we show in the Introduction to our Argument, *supra*, at page 43, no analogy from the pre-telephone era can be made to wiretapping. Indeed, outside the area of eaves-

dropping, we know of no case which authorized the seizure of something which has not yet come into existence. To assume that the novel invasion of privacy permitted by wiretapping is automatically incorporated in the Fourth Amendment grant of the limited right to search and seize, flies in the face of the guarantee found in the Ninth Amendment. Unless the Federal Constitution is amended to specifically permit wiretapping, wiretapping should be construed to be the invasion of a right to privacy retained by the People.

This Court has long acknowledged the overlapping functions of the Fourth and Fifth Amendments in protecting individual privacy. *Boyd* v. *United States,* 116 U.S. 616, 532 (1886); *Griswold* v. *Connecticut,* 381 U.S. 479, 484 (1965).

The Fifth Amendment's injunction that "No person . . . shall be compelled in any criminal case to be a witness against himself . . . " is here urged as prohibiting the seizure of a man's private thoughts and words. We submit that the invasion involved in wiretapping is not better, and probably worse than the emptying of a man's stomach to secure evidence from him, *Rochin* v. *California,* concurring opinion of Mr. Justice Black, 342 U.S. 165, 174. In that case Mr. Justice Black said:

> "I think a person is compelled to be a witness against himself not only when he is compelled to testify, but also when as here, incriminating evidence is forcibly taken from him by a contrivance of modern science." 342 U.S. 165, 175.

We submit that wiretapping constitutes just such a contrivance.

This Court had held that the compulsion of testimony by the use of truth serum constitutes a deprivation of due process. *Townsend* v. *Sain*, 372 U.S. 293, 307-309 (1963). We urge that there is no meaningful distinction between that case and this. The individual's defenses being down, as to intrusion by a third party, no distinction can be drawn between wiretapping and the medical pumping of a man's body or his mind.

POINT II

Section 813-a of the New York Code of Criminal Procedure Is Unconstitutional on Its Face as Being Violative of the Federal Fourth and Fourteenth Amendments.

In *Berger* v. *New York*, 388 U.S. 41 (1967), this Court had before it the same permissive eavesdropping statute which provided the authority for the wiretapping in the present case, Section 813-a of the New York Code of Criminal Procedure (*see* 388 U.S. 41, 43, footnote 1).* *Berger*

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* Since the grant of certiorari in the present case, New York State statutory law concerning wiretapping has undergone a complete revision. Section 813-a has been repealed, and Title III of the New York Code of Criminal Procedure has been enacted in its place. Laws of 1968, Chapter 546. We shall, during the course of our argument, *infra*, Point III, pages 67-79, demonstrate that the procedures followed in the instant case fall far short of those required by the new legislation. As we noted *supra*, at page 50, in relation to the new Federal eavesdropping law, such a comparison is instructive in revealing the current legislative feeling concerning minimal standards which ought to be required for wiretapping. The new State statute is expressly made inapplicable to wiretapping performed prior to its enactment. New York Eavesdropping Warrants Law, Section 6; Appendix C hereto, *infra*, pages C10-11.

For the convenience of the Court, the text of the new New York statutes is reproduced in Appendix C, hereto, *infra*.

involved "bugging" pursuant to that statute. An examination of Section 813-a reveals that it provides for identical procedures whether the order sought is for "bugging" or wiretapping. The statute is reproduced in Appendix A hereto, *infra*.

Berger revealed Section 813-a to be tragically unconstitutional:

> "We have concluded that the language of New York's statute is too broad in its sweep resulting in a trespassory intrusion into a constitutionally protected area and is, therefore, violative of the Fourth and Fourteenth Amendments. This disposition obviates the necessity for any discussion of the other points raised." 388 U.S. 41, 44.
>
> " . . . we have concluded that the statute is deficient on its face in other respects. Since the Petitioner clearly has standing to challenge the statute, being indisputably affected by it, we need not consider either the sufficiency of the affidavits upon which the eavesdrop orders were based, or the standing of Petitioner to attack the search and seizure made thereunder." 388 U.S. 41, 55.
>
> "Our concern with the statute here is whether its language permits a trespassory invasion of the home or office, by general warrant, contrary to the command of the Fourth Amendment. *As it is written,* we believe that it does." 388 U.S. 64. (Emphasis added.)

So as to avoid repetition, we defer our analysis of the specific Section 813-a procedural requirements (or, more precisely, non-requirements), until our discussion of the actual procedures which were followed in the present case.

Pages 67-79, *infra*. The fact remains that this Court has declared the statute to be unconstitutional on its face and has refused to uphold the validity of search and seizure performed pursuant to the statute.

In passing upon the Petitioner's case, the New York Court of Appeals had the benefit of this Court's decision in *Berger, supra*. One of the grounds relied upon by the Court of Appeals in sustaining the wiretapping herein was that *Berger* dealt only with "bugging" by trespassory intrusion upon private premises, and did not affect wiretapping, which is non-trespassory in nature. (*People v. Kaiser*, 21 N.Y. 2d 86, 99-101; A. 316-318). The Petitioner submits that this Court's pronouncements in *Katz* v. *United States*, 389 U.S. 347 (1967), have dissipated that aspect of the Court of Appeals decision, and have revealed wiretapping to constitute a search and seizure.

In specifically overruling *Olmstead* v. *United States*, 277 U.S. 438 (1928) and in making clear that "the Fourth Amendment protects people, not places", *Katz* simply applied the eighteenth century concept of privacy to the twentieth century world of scientific snooping. 289 U.S. 41, 88 S.Ct. 507, 511-512.

Katz involved the unique situation of "bugging" being used by Federal agents to listen to the words uttered into a public telephone by a suspect. Although this was not wiretapping, the situation provided the opportunity for the opinion to deal with the essential problem involved in wiretapping:

> "The Government stresses the fact that the telephone booth from which the Petitioner made his calls was constructed partly of glass, so that he was as visible

after he entered it as he would have been if he had remained outside. But what he sought to exclude when he entered the booth was not the intruding eye—it was the uninvited ear. He did not shed his right to do so simply because he made his calls from a place where he might be seen. No less than an individual in a business office, in a friend's apartment, or in a taxicab, a person in a telephone booth may rely upon the protection of the Fourth Amendment. One who occupies it, shuts the door behind him, and pays the toll that permits him to place a call, is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world. To read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication." 289 U.S. 347, ——, 88 S.Ct. 507, 511-512.

Although *Katz* involved the activities of Federal agents, the same search and seizure standards are applicable to the States. *Ker* v. *California,* 374 U.S. 23, 33-34 (1963), *Aguilar* v. *Texas,* 378 U.S. 108, 110 (1964).

In what amounts to a postscript to its opinion, the Court of Appeals attempted to "rehabilitate" Section 813-a by reading into it the concededly absent requirements of the Fourth Amendment. 21 N.Y. 2d 86, 103-05; A. 320-321. The questionable constitutional validity of this judicial revision of the statute is discussed by Chief Judge Fuld in his dissenting opinion, 21 N.Y. 2d 86, 109-110; A. 326-328. In any event, as revealed, *infra,* under Point III, the procedures followed in the instant case do not conform to the rehabilitated statute, and the new standards read into the statute by the Court of Appeals are expressly made applicable only to wiretapping performed after the date of the decision in *Berger* v. *New York,* 21 N.Y. 2d 86, 103; A. 320.

Since wiretapping does constitute a search and seizure, the holding of this Court in *Berger* v. *New York, supra,* requires that the tapping of the Petitioner's telephone conversations pursuant to Section 813-a be declared unconstitutional.

POINT III

The Wiretap Order Herein Was Unconstitutional in Its Origins, on Its Face, and in Its Implementation, All of These Being in Violation of the Fourth, Fifth, Ninth and Fourteenth Amendments of the Federal Constitution.

A. The Wiretap Order Was Not Based Upon the Showing of Probable Cause Required for Searches Generally, nor Upon the Particular Showing of Necessity Which Ought Be Required in the Case of Wiretap Searches.

The written petition of the Assistant District Attorney who applied for the wiretap order was a form petition with the blanks appropriately filled in. (A. 17.) It alleged that he was then engaged in the investigation of crimes committed in violation of the Penal Law of New York, particularly Attempted Extortion, Conspiracy to Commit Extortion and Conspiracy to Commit a Crime. It stated that in connection with the above investigation, he was conducting an investigation of the criminal activities of Salvatore Granello, Dino Conte and other unknown persons,

> "who your Petitioner is informed and believes, have been and are engaged in criminal activities in connection with the aforesaid crime, and who, either as par-

ticipants or as material witnesses, have knowledge or information regarding said crime and are in communication by telephone with other persons having such knowledge and information." (A. 17-18.)

The petition then goes on to allege that he has reason to believe the telephone at the Headline Bar is:

"... the means of carrying on and promoting criminal activities; and Petitioner is informed and has reason to believe that evidence of crime may be obtained by intercepting telephone communications being transmitted over the aforesaid telephone instrument ..." (A. 18).

Not one concrete fact concerning the alleged crimes is mentioned in the petition; it does not state the means being employed to commit the crimes, and it does not identify the victim. The request for authority to wiretap does not even allege that evidence *of the mentioned crimes* is likely to be uncovered; it states only that "evidence of crime may be obtained." (A. 18.)

Turning to the *ex parte* testimony given by the Assistant District Attorney in support of his application, the most that can be said is that the Assistant District Attorney had reasonable grounds to believe that the crime of extortion had been attempted by Granello and Conte. (A. 20-40.) The probable cause called for by the Fourth Amendment is not established simply by such a showing; there must be probable cause to believe that the search will uncover evidence of the alleged crime. No such probable cause was established by the testimony. The testimony simply revealed that Granello had had telephone conversations with Holtzman, and that one of a number of tele-

phones used by Granello was located in the Headline Club, a place where Granello would sometimes be. No firm or continuing connection of Granello with that telephone was shown; no actual past conversation between Granello and any other co-conspirator was alleged. To permit Granello's mere occasional use of the telephone at the Headline Club to fulfill the function of probable cause, would be to nullify the Fourth Amendment; it would sanction the tapping of every telephone with which Granello would come in occasional contact.

In *Berger* this Court has given strong indication that a particular showing of necessity, ought be required before an eavesdrop order should issue:

> "Finally, the statute's procedure, necessarily because its success depends on secrecy, has no requirement for notice as do conventional warrants, nor does it overcome this defect by requiring some showing of special facts. On the contrary, it permits uncontested entry without any showing of exigent circumstances. Such a showing of exigency, in order to avoid notice would appear more important in eavesdropping, with its inherent dangers, than that required when conventional procedures of search and seizure are utilized." 388 U.S. 41, 60.

The recently adopted Federal and New York State eavesdropping statutes both expressly require such a showing of necessity, and provide that the application for an eavesdropping order must contain:

> "(d) a full and complete statement as to whether or not other investigative procedures have been tried and

failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous." 18 U.S.C. 2518 (1)(c); Appendix B hereto, *infra*, page B16.

"(d) a statement of facts establishing that normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous to employ, to obtain the evidence or information sought, and that such information is not otherwise legally privileged." N.Y. Code Crim. Proc., Section 817 (2)(d); Appendix C hereto, *infra*, page C4; *see also* sections 817 and 819, generally.

The lack of *probable* cause, in the present case, to believe that the sought after conversations would actually be seized, is all the more startling when it is realized that the telephone was located in a public bar/restaurant in the busy Times Square area of Manhattan.

B. The Wiretap Order Authorized an Unconstitutional General Search of Sixty Days Duration.

As issued, the wiretap order (A. 42) recited "that there is reasonable ground to believe that evidence of crime may be obtained by intercepting telephone communications of the telephone . . ." It provided that the District Attorney, the Assistant District Attorney and any and all persons employed or assigned to their control or direction:

". . . are hereby authorized and empowered to intercept and record all telephone communications made by and to Salvatore Granello, Dino Conte and any and all other persons communicating by both incoming and outgoing calls . . ."

over the telephone in question. The order provided for an effective period of sixty days, July 1, 1964 to August 29, 1965. (A. 43.)

The basic unconstitutionality of such a general warrant to search and seize was made clear by this Court in *Berger:*

> "• • • New York's broadside authorization rather than being 'carefully circumscribed' so as to prevent unauthorized invasions of privacy actually permits general searches by electronic devices, the truly offensive character of which was first condemned in *Entick* vs. *Carrington,* 19 How. St. Tr. 1029, and which were then known as 'general warrants'. The use of the latter was a motivating factor behind the Declaration of Independence. In view of the many cases commenting on the practice it is sufficient here to point out that under these 'general warrants' customs officials were given blanket authority to conduct general searches for goods imported to the Colonies in violation of the tax laws of the Crown. The Fourth Amendment's requirement that a warrant 'particularly describ(e) the place to be searched, and the persons or things to be seized' repudiated these general warrants and 'makes general searches • • • impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant'. *Marron* vs. *United States,* 275 U.S. 192, 196 • • • " 388 U.S. 41, 58.

The opinion went on to show that the provisions of Section 813-a (which are identical with the provisions of the order herein) authorized nothing less than a general warrant:

"... the statute's failure to describe with particularity the conversations sought gives the officer a roving commission to 'seize' any and all conversations. It is true that the statute requires the naming of 'the person or persons whose communications, conversations or discussions are to be overheard or recorded * * *'. But this does no more than identify the person whose constitutionally protected area is to be invaded rather than 'particularly describing' the communications, conversations or discussions to be seized. As with general warrants this leaves too much to the discretion of the officer executing the order. Secondly, authorization of eavesdropping for a two month period is the equivalent of a series of intrusions, searches and seizures pursuant to a single showing of probable cause. Prompt execution is also avoided. During such a long and continuous (24 hours a day) period the conversations of any and all persons coming into the area covered by the device will be seized indiscriminately and without regard to their connection with the crime under investigation. * * * Third, the statute places no termination date on the eavesdrop once the conversation sought is seized. This is left entirely in the discretion of the officer. * * *" 388 U.S. 41, 59-60.

In attempting to overcome the above holding of *Berger*, the opinion of the Court of Appeals states, at 21 N.Y. 2d 86, 96; A. 312-313:

"With this requirement as with all the requirements of the statute the order in question complied. The most cursory examination of the testimony of the Assistant District Attorney made under oath before the

Judge who issued the warrant clearly indicates that there was probable cause to believe that a crime was being committed and that the conversations regarding threats to Mr. Holtzman and his family would be obtained.

"It is true that the order did not adequately specify the precise conversations which were sought—although the testimony of the Assistant District Attorney under oath, which becomes part of the order, did (Code Crim. Pro. § 813-a); that the order was not sufficiently limited in time—although there is no evidence that the execution of the order exceeded a reasonable period and the actual conversations seized came within a limited period of three days; that no exigent circumstances were alleged for dispensing with the notice requirement—although, under Supreme Court decisions defining 'exigent circumstances', those circumstances were present here (*Ker* vs. *California*, 374 U.S. 23, 37-40); and that there was no return on the warrant—although we presume, since the Defendant did not argue otherwise, that a return was made. [The authorization for the wiretaps included not only the conversations of Salvatore Granello and Dino Conte and those with whom they communicated but all those who communicated over the telephone located at the Headline Bar. Such authorization was necessary for the purpose of immunizing the police from prosecution for violating section 738 of the former Penal Law, since the very device which the police were apparently required to employ would pick up all conversations on the telephone in question. It is precisely because eavesdropping poses such a threat to the right of privacy that it should be undertaken under strict judicial

supervision and subject to the severest constitutional restraints.]* The reason for these defects is obvious—there has been no previous decision outlining the necessity for those requirements which *Berger* found to be mandatory. Under these circumstances, a reversal of the conviction would not be warranted either under the decisions of this Court or the Supreme Court (*People* v. *McQueen*, 18 N.Y. 2d 337; *People* v. *DeRenzzio*, 19 N.Y. 2d 45; *People* v. *Rensing*, 20 N.Y. 2d 936; *Johnson* v. *New Jersey*, 384 U.S. 719; *Stovall* v. *Denno*, 388 U.S. 293)."

The above approach is in direct conflict with that which was reaffirmed by this Court in *Katz* v. *United States*, 389 U.S. 347, ——, 88 S. Ct. 507, 514:

"The Government urges that, because its agents relied upon the decisions in *Olmstead and Goldman*, and because they did no more here than they might properly have done with prior judicial sanction, we should retroactively validate their conduct. That we cannot do. It is apparent that the agents in this case acted with restraint. Yet the inescapable fact is that this restraint was imposed by the agents themselves, not by a judicial officer. They were not required, before commencing the search, to present their estimate of probable cause for detached scrutiny by a neutral magistrate. They were not compelled, during the conduct of the search itself, to observe precise limits established in advance by a specific court order. Nor were they directed, after the search had been completed, to notify the authorizing magistrate in detail

* The bracketed reference is to the footnote which appears in the original opinion.

of all that had been seized. In the absence of such safeguards, this Court has never sustained a search upon the sole ground that officers reasonably expected to find evidence of a particular crime and voluntarily confined their activities to the least intrusive means consistent with that end. Searches conducted without warrants have been held unlawful 'notwithstanding facts unquestionably showing probable cause.' *Agnello* vs. *United States,* 269 U.S. 20, 33, 46 S. Ct. 4, 6, 70 L.Ed. 145, for the Constitution requires 'that the deliberate, impartial judgment of a judicial officer . . . be interposed between the citizen and the police . . . ' *Wong Sun* vs. *United States,* 371 U.S. 471, 481-482, 83 S. Ct. 407, 414, 9 L.Ed. 2d 441. 'Over and again this Court has emphasized that the mandate of the (Fourth) Amendment requires adherence to judicial processes.' *United States* vs. *Jeffers,* 342 U.S. 48, 51, 72 S. Ct. 93, 95, 96 L.Ed. 59, and that searches conducted outside the judicial process, without prior approval by a judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions."

The same approach was taken by this Court in *Osborn* v. *United States,* 385 U.S. 323 and *Berger* v. *New York,* 388 U.S. 41.

It is true that an order was issued by a judge in the present case and there was none in *Katz,* but there was such an order in *Berger.* An analysis of the order in the instant case (reproduced at A. 41) reveals that no meaningful restraint was placed upon the wiretappers. They were authorized to intercept "*all* telephone communi-

cations made by and to Salvatore Granello, Dino Conte and *any and all other persons* communicating by both incoming and outgoing calls over the telephone" which was located in a public bar situated in the busy Times Square area of Manhattan. (*Emphasis added.*) The interceptions were authorized to continue for a period of sixty days and were without any provision for termination if the conversations sought were earlier seized. The order's blanket grant of permission was without adequate judicial supervision or protective procedures. An order, authorizing the board intrusion into privacy that is entailed in wiretapping, must be something more than a magical piece of paper signed by a judge and based only upon the reasonable belief that a crime is being committed and that one of the perpetrators of that crime sometimes uses a telephone which is located in a public place. The order herein was nothing more than that. No restrictions were placed upon the wiretappers other than that they tap the right telephone.

Petitioner therefore urges that the *carte blanche* authorization given by the order herein was the equivalent of a general warrant; that the warrant may not be brought within the requirements of the Federal Constitution by assuming that the wiretappers relied upon the prior decisions of this Court or by reference to the fact that they did less than the order permitted them to do.

C. The Wiretap Order Did Not Provide for a Return, nor Was There in Fact a Return Made.

The Court of Appeals, in its opinion, attempted to avoid the problem posed by the lack of a return provision in the order by stating:

> "It is true . . . that there was no return on the warrant —although we presume, since the Defendant did not argue otherwise, that a return was made." 21 N.Y. 2d 86, 96-97; A. 312-313.

We did argue to the Court of Appeals that the order did not provide for a return (*See,* for example, Appellant's Reply Brief in the Court of Appeals, pages 16-17)—that can be seen from an examination of the order itself (A. 41-42). It is difficult to understand the basis for the Court's presumption that although there was no such provision, a return was in fact made. There is no evidence anywhere in the record of such a return being made. Indeed, the record reveals clearly to the contrary. The testimony of the various policemen who installed the wiretap equipment, removed the recorded tapes, listened to them and stored them shows this to be the case. *See,* for example, the testimony of Detective Costello, who retrieved People's exhibit 9, (tape on which the Petitioner's conversations appear) from the recording machine, brought it home for the weekend, and on the following Monday morning ". . . brought it to the District Attorney's office for safekeeping." (R. 157-158.)

In answering our claim that no return was made, the State of New York, in its *Brief in Opposition* to our Petition for a Writ of Certiorari in this Court, said at page 20:

> "Nothing could be further from the truth. In the best way possible, a return was made to the defense counsel and the Judge prior to and during the trial."

It is clear from the minutes of the pre-trial wiretap proceedings, presided over by the trial judge, that prior to

that time, neither the judge nor defense counsel listened to the wiretaps in question or received a return thereof. (A. 62-63.) That hearing was almost two years after the seizures in question.

Both *Berger* and *Katz* leave no doubt that the type of return which is necessary to minimize the danger of an unlawful search, is not one which is made months or years after the search, and then only at the discretion of the police officers. It must be a return made by direction, and it should consist of prompt notification to the authorizing magistrate, showing how the order was executed and specifying in detail all that had been seized. *Berger* v. *New York,* 388 U.S. 41, 57, 60; *Katz* v. *United States,* 389 U.S. 347, ——, 88 S. Ct. 507, 514.

It is to be noted that the recently adopted Federal and New York eavesdropping statutes require such a return to be made and for the seized conversations to be carefully safeguarded. 18 U.S.C. 2518 (8)(a), Appendix B, hereto, *infra,* B19-20; New York Code of Criminal Procedure, Section 823(3); Appendix C, hereto, *infra,* page C8.

The complete lack of judicial supervision in the searches and seizures made in this case demonstrates that the law enforcement authorities operated under nothing less than an unconstitutional general warrant.

D. The Broad Grant of Wiretapping Permission in the Present Case, Covering a Number of Telephones, Compounded the Unconstitutionality of the Search, so as to Decisively Deprive the Wiretapping of Any Semblance of Due Process.

The seizure of the Petitioner's conversations was part of a comprehensive plan in which court orders were ob-

tained pursuant to Section 813-a, authorizing the wiretapping of at least four telephones, two of which were coin operated public telephones, and one (that over which the Petitioner's conversations were seized) was located in and available to the patrons of a restaurant bar situated in the busy Times Square area of Manhattan. The fourth telephone was apparently listed to a private home. At his trial, the Petitioner was prevented from ascertaining the actual number of telephones which were wiretapped (A. 126-128). The police officials who installed and supervised the wiretaps were either unable or unwilling to reveal the total number of reels of tape which the wiretapping produced (A. 147-148, 163-165, 169-170, 191-195).

Prior to the argument of this case, we shall move this Court for an order directing the District Attorney of Nassau County to deliver to this Court an inventory of all wiretap orders applied for, granted and implemented in the present case, as well as all of the actual taps produced by wiretapping in the case.

It is clear, from the testimony at the trial, that the District Attorney of Nassau County maintains a sizable staff of police officers whose primary duties are in the field of wiretapping. (See A. 136, 139, 143, 149, 156-158, 167-168 and 186-187.)

Without regard to other possible wiretaps, the four wiretaps which are known to have been made in this case were such a broad intrusion into the privacy of the public at large as to totally deprive the procedure of any semblance of due process, and regard for the protections of the Fourth Amendment. This was a fishing expedition into public privacy, with the mere hope that evidence might be turned up. For this reason alone, the wiretapping should be held to be an unconstitutional search and seizure.

POINT IV

Since the Wiretapping Herein Constituted a Direct Violation of the Petitioner's Fourth Amendment Right Against Unlawful Searches and Seizures, His Conviction Should Be Reversed.

Under Point IB, *supra,* at page 52, we argued that since the Petitioner's telephone conversations were seized in violation of the Federal Communications Act, his conviction should be reversed. We examined the exclusionary rule and urged that it be applied to the Petitioner's case. The reasoning there used, is adopted herein, and applies *a fortiori,* since a direct violation of the Fourth Amendment falls squarely within the rule of *Mapp* v. *Ohio,* 367 U.S. 643, and, in any event, this case comes to this Court in the appellate process. *Linkletter* v. *Walker,* 381 U.S. 618, 622.

POINT V

The Petitioner Was Denied a Fair Trial in Violation of the Federal Fifth and Fourteenth Amendments by the Prosecutor's Intentional and Repeated References, in His Summation to the Jury, Characterizing the Recorded, Wiretapped, Conversations of the Petitioner as "Confessions"; the Resulting Prejudice Was Compounded Since the Prosecutor, in Effect, Capitalized Upon the Fact That This Court Announced Its Decision in MIRANDA v. ARIZONA, 384 U.S. 436, During the Course of the Petitioner's Trial.

Of the mass of exhibits admitted into evidence at the trial, the wiretapped recordings of the Petitioner's two telephone conversations with Dino Conte were the only evidence alleged to connect the Petitioner with the crimes charged in the indictment. The Petitioner testified at his trial and swore that any information which he gave to Conte and Granello was innocently given and that he had no knowledge of a criminal conspiracy to extort. He said that it had been his understanding that this information would be helpful to Granello's collection of a long-standing debt from Holtzman.

There was no confession—signed or oral—by the Petitioner in this case. The tape recorded conversations certainly contain no confession or formal acknowledgment of guilt. They can be considered no more than circumstantial evidence. The full text of the conversations is reproduced in the Petitioner's Appendix at pages 269-296.

In view of the above, it was baseless and unfairly prejudicial for the prosecutor to repeatedly urge the jury in summation that the tape recordings contained confessions by the Petitioner.

The Petitioner's trial commenced on June 1, 1966 (R. 41) and the summations to the jury were made on July 5, 1966. This Court decided the landmark confession case of *Miranda* v. *Arizona*, 384 U.S. 436, on June 13, 1966, in the midst of the trial. It would be wishful thinking to assume that the jurors were not exposed to the great deal of publicity attendant upon that decision, as well as the national division of opinion concerning its merits.

Aside from the immediate effects of the *Miranda* decision, the mass media have saturated the public with news of recent court decisions concerning confessions. Aside from the earlier lay impression of the damaging nature of a confession, the average individual now has a vastly heightened impression of the damning nature of a true confession which is admitted into evidence. Since the prosecutor so frequently in his summation referred to the telephone conversations as being "confessions", there can be little doubt that a jury of laymen accepted his characterization.

The prosecution was, of course, free to urge the jury that the Petitioner's statements indicated guilt, but not that they confessed guilt. Likewise, Kaiser, the Petitioner, was free, as he did, to show that there was a thoroughly innocent meaning to his words. This was what the whole case was about, there not being any other evidence against the Petitioner. By using the tactic of calling the conversations "confessions", the prosecutor, in effect, informed the jury that there was no question of fact for them to pass upon.

We urge this Court that the use of this tactic by the prosecution denied the Petitioner a fair trial, and the due

process guaranteed by the Federal Fourteenth Amendment thus requires the reversal of his conviction on that ground.

The prejudicial course of conduct pursued by the prosecutor began in his opening address to the jury where he declared that Defendant's taped words were "an absolute, complete *admission* of his part and parcel in this conspiracy". (A. 106.) Then, lifting himself by his bootstraps, the prosecutor in summation declared that the words were the equivalent of an "absolute confession". (A. 247.)

There followed a procession of references to the alleged confession:

> ". . . he confessed to that the only thing he didn't realize that it would be broadcast to a jury of twelve of his peers." (A. 248.)
>
> • • • • •
>
> "Now what do we have Mr. Kaiser saying in this confession?" (R. 2576.)
>
> • • • • •
>
> "That's the plain word meaning. That's an admission, a confession." (A. 249.)

Finally, at the close of the prosecutor's summation the taped words became an unqualified confession:

> "You have here a conspiracy shown through the acts of one conspirator coupled with absolute unqualified confession on People's exhibits 9A and 9B by this defendant, THOMAS KAISER." (A. 249.)

People's exhibits 9A and 9B were the typewritten transcripts of the Petitioner's telephone conversations. (A. 175-176.) The above statement created the aura of a *written* confession.

Based upon the above characterization, the Defense moved for a mistrial. (A. 250.) There was an extended colloquy on the question in which the Court made clear that it did not consider the wiretapped confessions to be confessions. (A. 250-253.) The Judge stated:

> "Well, I'm concerned with it. There is no question I'm concerned with it. And, I'll tell you very frankly, Mr. DOOLITTLE, I'm quite upset after a month's trial, after your statement I'm quite upset about it." (A. 252.)

The Court revealed his own impression that the prosecutor had "equated the admission with a signed confession". (A. 251.) He noted that he had not said anything during the prosecutor's summation because that would just highlight the error. (A. 252.)

The Defense motion for a mistrial was denied and counsel requested that the Court attempt to cure the error in his charge. (A. 253.) However, in his charge, the Court merely defined the distinction between an admission and a confession. (A. 258.) No instruction was given that there was no confession in the case.

The prosecutor's intentional conduct herein, in effect, breached the Defendant's right against testimonial compulsion as specified in the Fifth Amendment. Aside from the basic question of the due process raised by the prosecutor's conduct, the surrounding circumstances in this situation (this Court's decision in *Miranda*, and the typewritten

transcript of the conversations) compounded the error. We urge that these factors effectively deprived the Petitioner of his rights as specified in the Fifth Amendment and guaranteed by the Fourteenth Amendment. It would indeed be anomalous if a prosecutor may, as was done here, falsely impute a confession to a defendant, and the consequent conviction is permitted to stand; whereas, in the case of certain persons who have actually confessed, reference to the actual confession requires the reversal of the conviction. *Miranda* v. *Arizona, supra.*

Conclusion

It is respectfully submitted that the judgment of the Court below should be reversed and the prosecution against the Petitioner, Thomas R. Kaiser, be ordered dismissed.

Respectfully submitted,

PETER L. F. SABBATINO
Attorney for Petitioner
Thomas R. Kaiser

HENRY J. BOITEL
Of Counsel

APPENDIX A

Text of the Constitutional and Statutory Provisions Involved

Constitution:

Article VI, Clause Two:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Amendment Four:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment Five:

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDICES

APPENDIX A

Text of the Constitutional and Statutory Provisions Involved.

United States Constitution:

Article Six, Clause Two

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Amendment Four

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment Five

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment Nine

The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment Fourteen, Section One

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

New York State Constitution

Article One, Section Twelve

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The right of the people to be secure against unreasonable interception of telephone and telegraph communications shall not be violated, and ex parte orders or warrants shall issue only upon oath or affirmation that there is reasonable ground to believe that evidence of crime may be thus obtained, and identifying the particular means of communication, and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof. Adopted by Constitutional Convention of 1938; approved by the people November 8, 1938.

Laws of the United States

47 U.S.C., Section 605

§ 605. Unauthorized publication or use of communications.

No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purpose, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for

the benefit of another not entitled thereto: *Provided,* That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress. June 19, 1934, c. 652, Title VI, § 605, 48 Stat. 1103.

Laws of the State of New York

Code of Criminal Procedure, Section 813-a

§ 813-a. Ex parte order for eavesdropping.

An ex parte order for eavesdropping as defined in subdivisions one and two of section seven hundred thirty-eight of the penal law may be issued by any justice of the Supreme Court or judge of a County Court or of the Court of General Sessions of the County of New York upon oath or affirmation of a District Attorney, or of the Attorney-General or of an officer above the rank of sergeant of any Police Department of the State or of any political subdivision thereof, that there is reasonable ground to believe that evidence of crime may be thus obtained, and particularly describing the person or persons whose communications, conversations or discussions are to be overheard or recorded and the purpose thereof, and, in the case of a telegraphic or telephonic communication, identifying the particular telephone number or telegraph line involved. In connection with the issuance of such an order the justice or judge may examine on oath the applicant and any other witness he may produce and shall satisfy himself of the existence of reasonable grounds for the granting of such application. Any such order shall be effective for the time specified therein but not for a period of more than two months unless extended or renewed by the justice or judge who signed and issued the original order upon

satisfying himself that such extension or renewal is in the public interest. Any such order together with the papers upon which the application was based, shall be delivered to and retained by the applicant as authority for the eavesdropping authorized therein. A true copy of such order shall at all times be retained in his possession by the judge or justice issuing the same, and, in the event of the denial of an application for such an order, a true copy of the papers upon which the application was based shall in like manner be retained by the judge or justice denying the same. As amended L. 1958, c. 676, eff. July 1, 1958.

APPENDIX B

Omnibus Crime Control and Safe Streets Act of 1968

Public Law 90-351; 82 Stat. 197

(18 U.S.C. Chapter 119; 47 U.S.C. 605)

AN ACT

To assist State and local governments in reducing the incidence of crime, to increase the effectiveness, fairness, and coordination of law enforcement and criminal justice systems at all levels of government, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Omnibus Crime Control and Safe Streets Act of 1968".

• • • • •

TITLE III—WIRETAPPING AND ELECTRONIC SURVEILLANCE

FINDINGS

SEC. 801. On the basis of its own investigations and of published studies, the Congress makes the following findings:

(a) Wire communications are normally conducted through the use of facilities which form part of an interstate network. The same facilities are used for interstate and intrastate communications. There has been extensive wiretapping carried on without legal sanctions, and without the consent of any of the parties to the conversation. Electronic, mechanical, and other intercepting devices are being used to overhear oral conversations made in private, with-

out the consent of any of the parties to such communications. The contents of these communications and evidence derived therefrom are being used by public and private parties as evidence in court and administrative proceedings, and by persons whose activities affect interstate commerce. The possession, manufacture, distribution, advertising, and use of these devices are facilitated by interstate commerce.

(b) In order to protect effectively the privacy of wire and oral communications, to protect the integrity of court and administrative proceedings, and to prevent the obstruction of interstate commerce, it is necessary for Congress to define on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized, to prohibit any unauthorized interception of such communications, and the use of the contents thereof in evidence in courts and administrative proceedings.

(c) Organized criminals make extensive use of wire and oral communications in their criminal activities. The interception of such communications to obtain evidence of the commission of crimes or to prevent their commission is an indispensable aid to law enforcement and the administration of justice.

(d) To safeguard the privacy of innocent persons, the interception of wire or oral communications when none of the parties to the communication has consented to the interception should be allowed only when authorized by a court of competent jurisdiction and should remain under the control and supervision of the authorizing court. Interception of wire and oral communications should further be limited to certain major types of offenses and specific categories of crime with assurances that the interception is justified and that the information obtained thereby will not be misused.

SEC. 802. Part I of title 18, United States Code, is amended by adding at the end the following new chapter:

"Chapter 119. WIRE INTERCEPTION AND INTERCEPTION OF ORAL COMMUNICATIONS

"Sec.

"2510. Definitions.

"2511. Interception and disclosure of wire or oral communications prohibited.

"2512. Manufacture, distribution, possession, and advertising of wire or oral communication intercepting devices prohibited.

"2513. Confiscation of wire or oral communication intercepting devices.

"2514. Immunity of witnesses.

"2515. Prohibition of use as evidence of intercepted wire or oral communications.

"2516. Authorization for interception of wire or oral communications.

"2517. Authorization for disclosure and use of intercepted wire or oral communications.

"2518. Procedure for interception of wire or oral communications.

"2519. Reports concerning intercepted wire or oral communications.

"2520. Recovery of civil damages authorized.

"§ 2510. Definitions

"As used in this chapter—

"(1) 'wire communication' means any communication made in whole or in part through the use of facilities for the transmission of communications by the

aid of wire, cable, or other like connection between the point of origin and the point of reception furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of interstate or foreign communications;

"(2) 'oral communication' means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation;

"(3) 'State' means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States;

"(4) 'intercept' means the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device;

"(5) 'electronic, mechanical, or other device' means any device or apparatus which can be used to intercept a wire or oral communication other than—

"(a) any telephone or telegraph instrument, equipment or facility, or any component thereof, (i) furnished to the subscriber or user by a communications common carrier in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business; or (ii) being used by a communications common carrier in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of his duties;

"(b) a hearing aid or similar device being used to correct subnormal hearing to not better than normal;

"(6) 'person' means any employee, or agent of the United States or any State or political subdivision

thereof, and any individual, partnership, association, joint stock company, trust, or corporation;

"(7) 'Investigative or law enforcement officer' means any officer of the United States or of a State or political subdivision thereof, who is empowered by law to conduct investigations of or to make arrests for offenses enumerated in this chapter, and any attorney authorized by law to prosecute or participate in the prosecution of such offenses;

"(8) 'contents', when used with respect to any wire or oral communication, includes any information concerning the identity of the parties to such communication or the existence, substance, purport, or meaning of that communication;

"(9) 'Judge of competent jurisdiction' means—

"(a) a judge of a United States district court or a United States court of appeals; and

"(b) a judge of any court of general criminal jurisdiction of a State who is authorized by a statute of that State to enter orders authorizing interceptions of wire or oral communications;

"(10) 'communication common carrier' shall have the same meaning which is given the term 'common carrier' by section 153(h) of title 47 of the United States Code; and

"(11) 'aggrieved person' means a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed.

"§ 2511. Interception and disclosure of wire or oral communications prohibited

"(1) Except as otherwise specifically provided in this chapter any person who—

"(a) willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communication;

"(b) willfully uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when—

"(i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

"(ii) such device transmits communications by radio, or interferes with the transmission of such communication; or

"(iii) such person knows, or has reason to know, that such device or any component thereof has been sent through the mail or transported in interstate or foreign commerce; or

"(iv) such use or endeavor to use (A) takes place on the premises of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or (B) obtains or is for the purpose of obtaining information relating to the operations of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or

"(v) such person acts in the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States;"

"(c) willfully discloses, or endeavors to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection; or

"(d) willfully uses, or endeavors to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection;

shall be fined not more than $10,000 or imprisoned not more than five years, or both.

"(2)(a) It shall not be unlawful under this chapter for an operator of a switchboard, or an officer, employee, or agent of any communication common carrier, whose facilities are used in the transmission of a wire communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the carrier of such communication: *Provided*, That said communication common carriers shall not utilize service observing or random monitoring except for mechanical or service quality control checks.

"(b) It shall not be unlawful under this chapter for an officer, employee, or agent of the Federal Communications Commission, in the normal course of his employment and in discharge of the monitoring responsibilities exercised by the Commission in the enforcement of chapter 5 of title 47 of the United States Code, to intercept a wire communication, or oral communication transmitted by radio, or to disclose or use the information thereby obtained.

"(c) It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

"(d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire or

oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State or for the purpose of committing any other injurious act.

"(3) Nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1143; 47 U.S.C. 605) shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. The contents of any wire or oral communication intercepted by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial hearing, or other proceeding only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power.

"§ 2512. Manufacture, distribution, possession, and advertising of wire or oral communication intercepting devices prohibited

"(1) Except as otherwise specifically provided in this chapter, any person who willfully—

"(a) sends through the mail, or sends or carries in interstate or foreign commerce, any electronic, me-

chanical, or other device, knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire or oral communications;

"(b) manufactures, assembles, possesses, or sells any electronic, mechanical, or other device, knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire or oral communications, and that such device or any component thereof has been or will be sent through the mail or transported in interstate or foreign commerce; or

"(c) places in any newspaper, magazine, handbill, or other publication any advertisement of—

"(i) any electronic, mechanical, or other device knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire or oral communications; or

"(ii) any other electronic, mechanical, or other device, where such advertisement promotes the use of such device for the purpose of the surreptitious interception of wire or oral communications,

knowing or having reason to know that such advertisement will be sent through the mail or transported in interstate or foreign commerce,

shall be fined not more than $10,000 or imprisoned not more than five years, or both.

"(2) It shall not be unlawful under this section for—

"(a) a communications common carrier or an officer, agent, or employee of, or a person under contract with, a communications common carrier, in the normal course of the communications common carrier's business, or

"(b) an officer, agent, or employee of, or a person under contract with, the United States, a State, or a political subdivision thereof, in the normal course of the activities of the United States, a State, or a political subdivision thereof, to send through the mail, send or carry in interstate or foreign commerce, or manufacture, assemble, possess, or sell any electronic, mechanical, or other device knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire or oral communications.

"§ 2513. Confiscation of wire or oral communication intercepting devices

"Any electronic, mechanical, or other device used, sent, carried, manufactured, assembled, possessed, sold, or advertised in violation of section 2511 or section 2512 of this chapter may be seized and forfeited to the United States. All provisions of law relating to (1) the seizure, summary and judicial forfeiture, and condemnation of vessels, vehicles, merchandise, and baggage for violations of the customs laws contained in title 19 of the United States Code, (2) the disposition of such vessels, vehicles, merchandise, and baggage or the proceeds from the sale thereof, (3) the remission or mitigation of such forfeiture, (4) the compromise of claims, and (5) the award of compensation to informers in respect of such forfeitures, shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions of this section; except that such duties as are imposed upon the collector of customs or any other person with respect to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the provisions of the customs laws contained in title 19 of the United States Code shall be performed with respect to seizure and forfeiture of electronic, mechanical, or other intercepting devices under this section by such officers, agents, or other persons as may be au-

thorized or designated for that purpose by the Attorney General.

"§ 2514. Immunity of witnesses

"Whenever in the judgment of a United States attorney the testimony of any witness, or the production of books, papers, or other evidence by any witness, in any case or proceeding before any grand jury or court of the United States involving any violation of this chapter or any of the offenses enumerated in section 2516, or any conspiracy to violate this chapter or any of the offenses enumerated in section 2516 is necessary to the public interest, such United States attorney, upon the approval of the Attorney General, shall make application to the court that the witness shall be instructed to testify or produce evidence subject to the provisions of this section, and upon order of the court such witness shall not be excused from testifying or from producing books, papers, or other evidence on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture. No such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor shall testimony so compelled be used as evidence in any criminal proceeding (except in a proceeding described in the next sentence) against him in any court. No witness shall be exempt under this section from prosecution for perjury or contempt committed while giving testimony or producing evidence under compulsion as provided in this section.

"§ 2515. Prohibition of use as evidence of intercepted wire or oral communications

"Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in

evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

"§ 2516. Authorization for interception of wire or oral communications

"(1) The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of—

"(a) any offense punishable by death or by imprisonment for more than one year under sections 2274 through 2277 of title 42 of the United States Code (relating to the enforcement of the Atomic Energy Act of 1954), or under the following chapters of this title: chapter 37 (relating to espionage), chapter 105 (relating to sabotage), chapter 115 (relating to treason), or chapter 102 (relating to riots);

"(b) a violation of section 186 or section 501(c) of title 29, United States Code (dealing with restrictions on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under this title;

"(c) any offense which is punishable under the following sections of this title: section 201 (bribery of public officials and witnesses), section 224 (bribery in sporting contests), section 1084 (transmission of

wagering information), section 1503 (influencing or injuring an officer, juror, or witness generally), section 1510 (obstruction of criminal investigations), section 1751 (Presidential assassinations, kidnapping, and assault), section 1951 (interference with commerce by threats or violence), section 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), section 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), section 659 (theft from interstate shipment), section 664 (embezzlement from pension and welfare funds), or sections 2314 and 2315 (interstate transportation of stolen property);

"(d) any offense involving counterfeiting punishable under sections 471, 472, or 473 of this title;

"(e) any offense involving bankruptcy fraud or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States;

"(f) any offense including extortionate credit transactions under sections 892, 893, or 894 of this title; or

"(g) any conspiracy to commit any of the foregoing offenses.

"(2) The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire or oral communications, may apply to such judge for, and such judge may grant in conformity with section 2518 of this chapter and with the applicable State statute an order authorizing, or approving the interception of wire or oral communications by investigative or law enforcement officers having responsibility for the investigation of the offense as to which the application

is made, when such interception may provide or has provided evidence of the commission of the offense of murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs, or other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year, designated in any applicable State statute authorizing such interception, or any conspiracy to commit any of the foregoing offenses.

"§ 2517. Authorization for disclosure and use of intercepted wire or oral communications

"(1) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may disclose such contents to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.

"(2) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication or evidence derived therefrom may use such contents to the extent such use is appropriate to the proper performance of his official duties.

"(3) Any person who has received, by any means authorized by this chapter, any information concerning a wire or oral communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter may disclose the contents of that communication or such derivative evidence while giving testimony under oath or affirmation in any criminal proceeding in any court of the United States or of any State or in any Federal or State grand jury proceeding.

"(4) No otherwise privileged wire or oral communication intercepted in accordance with, or in violation of, the

provisions of this chapter shall lose its privileged character.

"(5) When an investigative or law enforcement officer, while engaged in intercepting wire or oral communications in the manner authorized herein, intercepts wire or oral communications relating to offenses other than those specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in subsections (1) and (2) of this section. Such contents and any evidence derived therefrom may be used under subsection (3) of this section when authorized or approved by a judge of competent jurisdiction where such judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this chapter. Such application shall be made as soon as practicable.

"§ 2518. Procedure for interception of wire or oral communications

"(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

"(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

"(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the

type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

"(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

"(d) a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

"(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

"(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

"(2) The judge may require the applicant to furnish additional testimony or documentary evidence in support of the application.

"(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the

judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that—

"(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

"(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

"(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

"(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

"(4) Each order authorizing or approving the interception of any wire or oral communication shall specify—

"(a) the identity of the person, if known, whose communications are to be intercepted;

"(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

"(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

"(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

"(e) the period of time during which such interception is authorized, including a statement as to whether

or not the interception shall automatically terminate when the described communication has been first obtained.

"(5) No order entered under this section may authorize or appprove the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days.

"(6) Whenever an order authorizing interception is entered pursuant to this chapter, the order may require reports to be made to the judge who issued the order showing what progress has been made toward achievement of the authorized objective and the need for continued interception. Such reports shall be made at such intervals as the judge may require.

"(7) Notwithstanding any other provision of this chapter, any investigative or law enforcement officer, specially designated by the Attorney General or by the principal prosecuting attorney of any State or subdivision thereof acting pursuant to a statute of that State, who reasonably determines that—

"(a) an emergency situation exists with respect to conspiratorial activities threatening the national security interest or to conspiratorial activities characteristic of organized crime that requires a wire or oral communication to be intercepted before an order authorizing such interception can with due diligence be obtained, and

"(b) there are grounds upon which an order could be entered under this chapter to authorize such interception,

may intercept such wire or oral communication if an application for an order approving the interception is made in accordance with this section within forty-eight hours after the interception has occurred, or begins to occur. In the absence of an order, such interception shall immediately terminate when the communication sought is obtained or when the application for the order is denied, whichever is earlier. In the event such application for approval is denied, or in any other case where the interception is terminated without an order having been issued, the contents of any wire or oral communication intercepted shall be treated as having been obtained in violation of this chapter, and an inventory shall be served as provided for in subsection (d) of this section on the person named in the application.

"(8)(a) The contents of any wire or oral communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire or oral communication under this subsection shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be

destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under subsection (3) of section 2517.

"(b) Applications made and orders granted under this chapter shall be sealed by the judge. Custody of the applications and orders shall be wherever the judge directs. Such applications and orders shall be disclosed only upon a showing of good cause before a judge of competent jurisdiction and shall not be destroyed except on order of the issuing or denying judge, and in any event shall be kept for ten years.

"(c) Any violation of the provisions of this subsection may be punished as contempt of the issuing or denying judge.

"(d) Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518(7)(b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of—

"(1) the fact of the entry of the order or the application;

"(2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and

"(3) the fact that during the period wire or oral communciations were or were not intercepted.

The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to a judge of competent jurisdiction the serving of the inventory required by this subsection may be postponed.

"(9) The contents of any intercepted wire or oral communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This ten-day period may be waived by the judge if he finds that it was not possible to furnish the party with the above information ten days before the trial, hearing, or proceeding and that the party will not be prejudiced by the delay in receiving such information.

"(10)(a). Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

"(i) the communication was unlawfully intercepted;

"(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

"(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

"(b) In addition to any other right to appeal, the United States shall have the right to appeal from an order granting a motion to suppress made under paragraph (a) of this subsection, or the denial of an application for an order of approval, if the United States attorney shall certify to the judge or other official granting such motion or denying such application that the appeal is not taken for purposes of delay. Such appeal shall be taken within thirty days after the date the order was entered and shall be diligently prosecuted.

"§ 2519. **Reports concerning intercepted wire or oral communications**

"(1) Within thirty days after the expiration of an order (or each extension thereof) entered under section 2518, or the denial of an order approving an interception, the issuing or denying judge shall report to the Administrative Office of the United States Courts—

"(a) the fact that an order or extension was applied for;

"(b) the kind of order or extension applied for;

"(c) the fact that the order or extension was granted as applied for, was modified, or was denied;

"(d) the period of interceptions authorized by the order, and the number and duration of any extensions of the order;

"(e) the offense specified in the order or application, or extension of an order;

"(f) the identity of the applying investigative or law enforcement officer and agency making the application and the person authorizing the application; and

"(g) the nature of the facilities from which or the place where communications were to be intercepted.

"(2) In January of each year the Attorney General, an Assistant Attorney General specially designated by the Attorney General, or the principal prosecuting attorney of a State, or the principal prosecuting attorney for any political subdivision of a State, shall report to the Administrative Office of the United States Courts—

"(a) the information required by paragraphs (a) through (g) of subsection (1) of this section with respect to each application for an order or extension made during the preceding calendar year;

"(b) a general description of the interceptions made under such order or extension, including (i) the approximate nature and frequency of incriminating communications intercepted, (ii) the approximate nature and frequency of other communications intercepted, (iii) the approximate number of persons whose communications were intercepted, and (iv) the approximate nature, amount, and cost of the manpower and other resources used in the interceptions;

"(c) the number of arrests resulting from interceptions made under such order or extension, and the offenses for which arrests were made;

"(d) the number of trials resulting from such interceptions;

"(e) the number of motions to suppress made with respect to such interceptions, and the number granted or denied;

"(f) the number of convictions resulting from such interceptions and the offenses for which the convictions were obtained and a general assessment of the importance of the interceptions; and

"(g) the information required by paragraphs (b) through (f) of this subsection with respect to orders or extensions obtained in a preceding calendar year.

"(3) In April of each year the Director of the Administrative Office of the United States Courts shall transmit to the Congress a full and complete report concerning the number of applications for orders authorizing or approving the interception of wire or oral communications and the number of orders and extensions granted or denied during the preceding calendar year. Such report shall include a summary and analysis of the data required to be filed with the Administrative Office by subsections (1) and (2) of this section. The Director of the Administrative Office of the United States Courts is authorized to issue binding regulations dealing with the content and form of the reports required to be filed by subsections (1) and (2) of this section.

"§ 2520. Recovery of civil damages authorized

"Any person whose wire or oral communication is intercepted, disclosed, or used in violation of this chapter shall (1) have a civil cause of action against any person who intercepts, discloses, or uses, or procures any other person to intercept, disclose, or use such communications, and (2) be entitled to recover from any such person—

"(a) actual damages but not less than liquidated damages computed at the rate of $100 a day for each day of violation or $1,000, whichever is higher;

"(b) punitive damages; and

"(c) a reasonable attorney's fee and other litigation costs reasonably incurred.

A good faith reliance on a court order or on the provisions of section 2518(7) of this chapter shall constitute a complete defense to any civil or criminal action brought under this chapter.".

SEC. 803. Section 605 of the Communications Act of 1934 (48 Stat. 1103; 47 U.S.C. 605) is amended to read as follows:

"UNAUTHORIZED PUBLICATION OF COMMUNICATIONS

"SEC. 605. Except as authorized by chapter 119, title 18, United States Code, no person receiving, assisting in receiving, transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, (1) to any person other than the addressee, his agent, or attorney, (2) to a person employed or authorized to forward such communication to its destination, (3) to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, (4) to the master of a ship under whom he is serving, (5) in response to a subpena issued by a court of competent jurisdiction, or (6) on demand of other lawful authority. No person not being authorized by the sender shall intercept any radio communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person. No person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by radio and use such communication (or any information therein contained) for his own benefit or for the benefit of another not en-

titled thereto. No person having received any intercepted radio communication or having become acquainted with the contents, substance, purport, effect, or meaning of such communication (or any part thereof) knowing that such communication was intercepted, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of such communication (or any part thereof) or use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto. This section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication which is broadcast or transmitted by amateurs or others for the use of the general public, or which relates to ships in distress."

SEC. 804. (a) There is hereby established a National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance (hereinafter in this section referred to as the "Commission").

(b) The Commission shall be composed of fifteen members appointed as follows:

(A) Four appointed by the President of the Senate from Members of the Senate;

(B) Four appointed by the Speaker of the House of Representatives from Members of the House of Representatives; and

(C) Seven appointed by the President of the United States from all segments of life in the United States, including lawyers, teachers, artists, businessmen, newspapermen, jurists, policemen, and community leaders, none of whom shall be officers of the executive branch of the Government.

(c) The President of the United States shall designate a Chairman from among the members of the Commission. Any vacancy in the Commission shall not affect its powers

but shall be filled in the same manner in which the original appointment was made.

(d) It shall be the duty of the Commission to conduct a comprehensive study and review of the operation of the provisions of this title, in effect on the effective date of this section, to determine the effectiveness of such provisions during the six-year period immediately following the date of their enactment.

(e)(1) Subject to such rules and regulations as may be adopted by the Commission, the Chairman shall have the power to—

(A) appoint and fix the compensation of an Executive Director, and such additional staff personnel as he deems necessary, without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, and without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates, but at rates not in excess of the maximum rate for GS-18 of the General Schedule under section 5332 of such title; and

(B) procure temporary and intermittent services to the same extent as is authorized by section 3109 of title 5, United States Code, but at rates not to exceed $100 a day for individuals.

(2) In making appointments pursuant to paragraph (1) of this subsection, the Chairman shall include among his appointment individuals determined by the Chairman to be competent social scientists, lawyers, and law enforcement officers.

(f)(1) A member of the Commission who is a Member of Congress shall serve without additional compensation, but shall be reimbursed for travel, subsistence, and other necessary expenses incurred in the performance of duties vested in the Commission.

(2) A member of the Commission from private life shall receive $100 per diem when engaged in the actual performance of duties vested in the Commission, plus reimbursement for travel, subsistence, and other necessary expenses incurred in the perfomance of such duties.

(g) Each department, agency, and instrumentality of the executive branch of the Government, including independent agencies, is authorized and directed to furnish to the Commission, upon request made by the Chairman, such statistical data, reports, and other information as the Commission deems necessary to carry out its functions under this section. The Chairman is further authorized to call upon the departments, agencies, and other offices of the several States to furnish such statistical data, reports, and other information as the Commission deems necessary to carry out its functions under this section.

(h) The Commission shall make such interim reports as it deems advisable, and it shall make a final report of its findings and recommendations to the President of the United States and to the Congress within the one-year period following the effective date of this subsection. Sixty days after submission of its final report, the Commission shall cease to exist.

(i)(1) Except as provided in paragraph (2) of this subsection, any member of the Commission is exempted, with respect to his appointment, from the operation of sections 203, 205, 207, and 209 of title 18, United States Code.

(2) The exemption granted by paragraph (1) of this subsection shall not extend—

(A) to the receipt of payment of salary in connection with the appointee's Government service from any source other than the private employer of the appointee at the time of his appointment, or

(B) during the period of such appointment, to the prosecution, by any person so appointed, of any claim

against the Government involving any matter with which such person, during such period, is or was directly connected by reason of such appointment.

(k) The foregoing provisions of this section shall take effect upon the expiration of the six-year period immediately following the date of the enactment of this Act.

(j) There is authorized to be appropriated such sum as may be necessary to carry out the provisions of this section.

APPENDIX C

New York State Eavesdropping Warrants Law as Signed Into Law on June 5, 1968

(Laws of 1968, Chapter 546; New York Code of Criminal Procedure, Title III)

Sec. 1. Title Two-A of part six of the code of criminal procedure, consisting of sections eight hundred thirteen-a and eight hundred thirteen-b, is hereby repealed.

Sec. 2. Such code is hereby amended by adding to part six thereof a new title, to be title three, to read as follows:

TITLE III

Eavesdropping Warrants

Section

814. Eavesdropping warrants; definitions of terms.

815. Eavesdropping warrants; in general.

816. Eavesdropping warrants; when issuable.

817. Eavesdropping warrants; application.

818. Eavesdropping warrants; application; how determined.

819. Eavesdropping warrants; form and content.

820. Eavesdropping warrants; renewals.

821. Eavesdropping warrants; manner and time of execution.

822. Eavesdropping warrants; order of amendment.

823. Eavesdropping warrants; notice and return.

824. Eavesdropping warrants; safeguarding and custody of warrants and applications.

825. Eavesdropping warrants; reports.

Sec. 814. Eavesdropping warrants; definitions of terms. As used in this title the following terms have the following meanings: 1. "Eavesdropping warrant" means an order of a justice authorizing wiretapping or mechanical overhearing of conversation, as those terms are defined in section 250.00 of the penal law.

2. "Justice" means any justice of the supreme court who has been designated by the governor as a justice of an appellate division, or any justice of the supreme court of the judicial district in which the eavesdropping warrant is to be executed, or any county court judge of the county in which the eavesdropping warrant is to be executed.

3. "Applicant" means a district attorney, the attorney general, the police commissioner of the police department of the city of New York, or the superintendent of the state police. If a district attorney, the attorney general, the police commissioner of the police department of the city of New York or the superintendent of the state police is actually absent or disabled the term "applicant" shall mean that person designated to act for him and perform his official function in and during his actual absence or disability.

4. "Exigent circumstances" means conditions requiring the preservation of secrecy, and whereby there is a reasonable likelihood that a continuing investigation would be thwarted by alerting any of the persons subject to surveillance to the fact that such surveillance had occurred.

Sec. 815. Eavesdropping warrants; in general. Under circumstances prescribed in this title, a justice may, upon ex parte application of an applicant, issue an eavesdropping warrant.

Sec. 816. Eavesdropping warrants; when issuable. An eavesdropping warrant may issue only upon an appropriate application made in conformity with this title, and upon reasonable cause to believe that evidence of the commission of a particular crime, or information aiding in the apprehension of the perpetrator of a particular crime, may be obtained, and upon a showing that normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous to employ, to obtain the evidence or information sought.

Sec. 817. Eavesdropping warrants; application. 1. An ex parte application for an eavesdropping warrant or order of amendment must be in writing, subscribed and sworn to by an applicant.

2. The application must contain:

(a) A statement of facts establishing reasonable cause to believe that a particularly described crime has been, is being, or is about to be committed; and

(b) A statement of facts establishing reasonable cause to believe that the conversation of a particularly described person will constitute evidence of the particularly described crime that has been, is being or is about to be committed or that the conversation will aid in the apprehension of the perpetrator of such crime which has been, is being, or is about to be committed. The statement shall include a particular description of the place or premises where the conversation will occur or a particular description of the telephone or telegraph lines over which the conversation will occur; and

(c) A particular description of the type of the conversation sought to be overheard; and

(d) A statement of facts establishing that normal investigative procedures have been tried and have failed

or reasonably appear to be unlikely to succeed if tried or to be too dangerous to employ, to obtain the evidence or information sought, and that such conversation is not otherwise legally privileged; and

(e) A statement of the period of time for which the eavesdropping is required to be maintained. If practicable, the application should designate hours of the day or night during which the conversation may be reasonably expected to occur. If the character of the investigation is such that the authorization for eavesdropping should not automatically terminate when the described conversation has been first obtained, the application must specifically state facts establishing reasonable cause to believe that additional conversations of the same type will occur subsequently; and

(f) If the applicant knows that a prior application has been submitted or a warrant previously obtained for eavesdropping on the person whose conversation is sought to be overheard, a statement fully disclosing the date, court, applicant, execution, results, and present status of the application or warrant.

3. Allegations of fact in the application may be based either upon the personal knowledge of the applicant or upon information and belief. If the applicant personally knows the facts alleged, it must be so stated. If the facts stated in the application are derived in whole or part from the statements of persons other than the applicant, the sources of such facts must be either disclosed or described, and the application must contain facts establishing the existence and reliability of the informants or the reliability of the information supplied by them. The application must also state, so far as possible, the basis of the informant's knowledge or belief. Affidavits of persons other than the applicant may be submitted in conjunction with the application if they tend to support any fact or conclusion alleged therein. Such accompanying affidavits may be based

either on personal knowledge of the applicant, or information and belief with the source thereof and the reason therefor specified.

Sec. 818. Eavesdropping warrants; application; how determined. 1. If the application conforms to section eight hundred seventeen, the justice may examine under oath any person for the purpose of determining whether grounds exist for the issuance of the warrant pursuant to section eight hundred sixteen. Any such examination must be either recorded or summarized in writing.

2. If satisfied that grounds exist for the issuance of an eavesdropping warrant pursuant to section eight hundred sixteen, the justice may grant the application and issue an eavesdropping warrant, in accordance with section eight hundred nineteen.

3. If the application does not conform to section eight hundred seventeen, or if the justice is not satisfied that grounds exist for the issuance, the application must be denied.

Sec. 819. Eavesdropping warrants; form and content. An eavesdropping warrant must contain:

1. The subscription and title of the issuing justice; and

2. The date of issuance, date of effect, if known, and termination date. The effective period of the warrant must not exceed twenty days. If the effective period of the warrant is to terminate upon the acquisition of a particular conversation, the warrant may so provide. If the effective period of the warrant is not to terminate upon the acquisition of a particular conversation, the warrant must so provide; and

3. A particular description of the person and the place, premises or telephone or telegraph line upon which eavesdropping may be conducted or has been approved; and

4. A particular description of the type of the conversation to be obtained by eavesdropping or which has been approved including a statement of the crime to which it relates; and

5. An express authorization to make secret entry upon a private place or premises to install the eavesdropping device, if such entry is necessary to execute the warrant.

Sec. 820. Eavesdropping warrants; renewals. 1. At any time prior to the expiration of an eavesdropping warrant or any renewal thereof, the applicant may apply to a justice for a renewal with respect to the same person, place, premises, or telephone or telegraph line. An application for renewal must incorporate the warrant sought to be renewed together with the application and any accompanying papers upon which it was issued.

The application for renewal must set forth the results of the eavesdropping already conducted, and it must set forth present grounds for extension in conformity with section eight hundred sixteen.

2. Upon such application, the justice may issue an order renewing the eavesdropping warrant and extending the authorization for a period not exceeding twenty days. Such an order shall specify the basis for the finding of present reasonable cause for the issuance of the renewal.

Sec. 821. Eavesdropping warrants; manner and time of execution. 1. An eavesdropping warrant may be executed by the applicant personally or by another person expressly and particularly designated by him for the purpose.

2. The warrant may be executed according to its terms during the hours specified, and for the authorized period or a part of the authorized period. Unless specifically otherwise ordered, the authorization must terminate upon the acquisition of the conversations described in the warrant. Warrants must be executed as soon as practicable. Upon

termination of the authorization in the warrant or any renewals thereof, eavesdropping must cease and any device installed for the purpose of the eavesdropping must be removed or permanently inactivated as soon as practicable. Entry upon a private place or premise for the removal or permanent inactivation of such device is deemed to be authorized by the warrant.

Sec. 822. Eavesdropping warrants; order of amendment. 1. When an eavesdropping warrant has been issued and is being or has been executed pursuant to this title and a conversation is overheard, the overhearing of which was not otherwise sought pursuant to such warrant, and such conversation constitutes evidence of a crime that has been, is being or is about to be committed or which will aid in the apprehension of the perpetrator of such crime, an applicant must, as promptly as practicable, apply to the justice who issued such warrant for an order amending such warrant to include such conversation.

2. The application for an order amending an eavesdropping warrant must contain: (a) a statement of facts fully disclosing the circumstances of the overhearing of such conversation including the date of issuance and present status of the eavesdropping warrant and the substance of such conversation; and (b) a statement of facts establishing reasonable cause to believe that such conversation does constitute evidence of a particularly described crime that has been, is being or is about to be committed or which will aid in the apprehension of the perpetrator of such crime.

3. If the justice is satisfied that such conversation was overheard pursuant to the eavesdropping warrant and that such conversation does constitute evidence of a particularly described crime that has been, is being or is about to be committed or which will aid in the apprehension of the perpetrator of such crime, he may amend such warrant to include such conversation.

Sec. 823. Eavesdropping warrants; notice and return. 1. Not later than sixty days after termination of the eavesdropping warrant or any renewals thereof, except as otherwise provided in subdivision two of this section, written notice of issuance of the eavesdropping warrant and of the period of authorized eavesdropping must be personally served upon the person named in the warrant whose conversations were sought to be overheard, or upon the owner, lessee, or occupant, if known, of the place or premises in which the eavesdropping device was installed, or upon the subscriber to the telephone or owner or lessee, or occupant, if known, of the place or premises in which the eavesdropping device was installed; or upon the subscriber to the telephone or owner or lessee of the telegraph line described in the warrant.

2. On a showing of exigent circumstances to the issuing justice the serving of the notice required by this section may be postponed by order of the justice for a reasonable period of time. Renewals of an order of postponement may be obtained on a new showing of exigent circumstances.

3. Within fourteen days after termination of the warrant or the last renewal thereof, a return must be made by the applicant to the justice who issued the warrant, which return the justice shall retain. The return shall consist of a report in writing subscribed and sworn by the applicant or by the person expressly and particularly designated by him to conduct or supervise the execution of the warrant, summarizing the conversations overheard or recorded, which may be thereafter used in criminal prosecution, lead to other evidence, or information leading to the apprehension of the perpetrator of a crime. It must also state whether the eavesdropping device has been removed or permanently inactivated.

Sec. 824. Eavesdropping warrants; safeguarding and custody of warrants and applications. Any eavesdropping warrant together with a copy of papers upon which the

application is based, shall be delivered to and retained by the applicant as authority for the eavesdropping authorized therein. A copy of such eavesdropping warrant, together with all the original papers upon which the application was based, shall be retained by the justice issuing the same, and, in the event of the denial of an application for such an eavesdropping warrant, a copy of the papers upon which the application was based shall be retained by the justice denying the same.

Sec. 825. Eavesdropping warrants; reports. In January of each year, each justice must report in writing on the operation of this title to the judicial conference. No report under this section shall be made on any eavesdropping until after notice has been served pursuant to section eight hundred twenty-three. The reports must contain:

(1) The number of applications made; (2) the number of warrants denied and issued; (3) the effective periods of such warrants; (4) the number and duration of any renewals; (5) the crimes in connection with which the warrants were sought; (6) the name of the applicant.

Sec. 3. Subdivision three of section 250.00 of the penal law is hereby amended to read as follows:

3. "Unlawfully" means not pursuant to an eavesdropping warrant.

Sec. 4. Section 250.20 of such law is hereby amended to read as follows:

Sec. 250.20. Divulging an eavesdropping warrant.

A person is guilty of divulging an eavesdropping warrant when, possessing information concerning the existence or content of an eavesdropping warrant issued pursuant to title three of part six of the code of criminal procedure, or concerning any circumstance attending an

application for such a warrant, he discloses such information to another person; except that such disclosure is not criminal or unlawful when made in a legal proceeding, or to a law enforcement officer or agency connected with the application for such warrant, or to the judicial conference, a legislative committee or temporary state commission, or to the telephone or telegraph corporation whose facilities are involved.

Divulging an eavesdropping warrant is a class A misdemeanor.

Sec. 5. Section forty-five hundred six of the civil practice law and rules, as last amended by chapter six hundred eighty of the laws of nineteen hundred sixty-seven, is hereby amended to read as follows:

Sec. 4506. Eavesdropping evidence.

Evidence obtained by any act of eavesdropping in violation of section 250.05 of the penal law, and evidence obtained through or resulting from information obtained by any such act, shall be inadmissible for any purpose in any civil or criminal action, proceeding or hearing; provided, however, that any such evidence shall be admissible in any civil or criminal action, proceeding or hearing against the person who has, or is alleged to have, violated section 250.05 of the penal law.

Sec. 6. In any civil or criminal action, proceeding or hearing or administrative or legislative hearing occurring after the effective date of this act, the admissibility of any evidence obtained by any act of eavesdropping prior to the effective date of this act, or any evidence obtained through or resulting from information obtained by any such act of eavesdropping, shall be determined according to the provision of law in force and effect immediately prior to the effective date of this act in the same manner as if this act had not been enacted.

Sec. 7. If any clause, sentence, paragraph, section or part of this act shall be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, section or part thereof directly involved in the controversy in which such judgment shall have been rendered.

Sec. 8. This act shall take effect immediately.